



ERROR OF QUALITY IN RECENT ROTAL JURISPRUDENCE*

JOHN C. AGNEW

SUMMARY. I. INTRODUCTION. A QUALITY DIRECTLY AND PRINCIPALLY INTENDED AND AN OBJECTIVELY IMPORTANT QUALITY. A. *Sentences which use a combination of Canals' interpretation and St. Alphonsus' third rule to recognize «error redundans»*. B. *Changes in the concept of matrimony which have influenced the notion of «error redundans»*. C. *A Brief History of St. Alphonsus' Third Rule in older Rotal Jurisprudence*. D. *A quality principally and directly intended*. E. *Proving a quality principally and directly intended*. II. ADDITIONAL QUESTIONS CONCERNING CANON 1097 § 2 («ERROR REDUNDANS», «ERROR CAUSAM DANS» AND RETROACTIVITY). A. *Error «Causam Dans» and an error of quality directly and principally intended*. B. *The retroactivity of canon 1097 § 2*. CONCLUSIONS. JURISPRUDENCE. BIBLIOGRAPHY. TABLE OF CONTENTS OF THE DOCTORAL THESIS.

I. INTRODUCTION. A QUALITY DIRECTLY AND PRINCIPALLY INTENDED AND AN OBJECTIVELY IMPORTANT QUALITY

The new Code of Canon Law, promulgated in 1983, has changed its disposition concerning an error of quality of the person capable of invalidating matrimony. As one may read in the acts concerning the drafting of canon 1097 § 2 (CIC 1983), this new formula corresponds to St. Alphonsus' doctrine and present-day Rotal jurisprudence¹. Even before the new code was being elaborated, Rotal jurisprudence has often strug-

* Director de la tesis: Prof. Dr. Juan Ignacio BAÑARES. Título: *Rotal Jurisprudence concerning Error of quality*. Fecha de defensa: 17.12.1991.

1. Cfr. *Communicationes*, 1983, p. 232.

gled with the problem of discerning when an error of quality affects the validity of the matrimonial contract.

Judge Canals, in a famous decision handed down on April 21, 1970, proposed a distinct formula for *error redundans*, that is, when an error of quality redounds in error of the person: «when a moral, juridical or social quality is considered so intimately connected with the physical person that, if this same quality is lacking, then the physical person turns out to be altogether different»². Hence, with this definition of the person, one must take into account qualities which are able to substantially change the person.

Although Canals' interpretation met with some resistance, it did have a strong influence on subsequent jurisprudence. In particular, one concept did stick: that the quality must be objectively important. At the same time, the third Alphonsian rule began gaining a wider acceptance and forming its own current. In many decisions, the aforementioned aspect continued being used in conjunction with an error of quality as interpreted by St. Alphonsus' third rule³. In other words, in order to recognize that an error of quality redounds in error of the person two new requirements were elaborated: 1) The quality must be important from an objective point of view, and 2) the same quality must be principally and directly intended by the contractant (St. Alphonsus' third rule).

Nearly all of the sentences which followed this line of thought, despite the fact that they required these two aspects to declare the nullity of the marriage, put more weight on the subjective aspect than on the objective aspect. Thus, the subjective importance of the quality received a pri-

2. «Tertia notio est cum qualitas moralis iuridica socialis tam intime connexa habetur cum persona physica ut, eadem qualitate deficiente, etiam persona physica prorsus diversa resultet». *Coram* (c.) CANALS, April 21, 1970, n. 2 in SRRD, Vol. 62, pp. 370 ff. Future references to Rotal sentences which are published in SRRD will give only the date and the *ponens*. All other decisions will be fully referenced.

3. One author has expressed a different opinion about St. Alphonsus' third rule which does not seem to have prospered. «Pienso que la 'tercia regla' alfonsiana, tal como ha sido reelaborada por Giacchi y Fumagalli, solamente tiene viabilidad jurídica dentro de la 'tercia notio' desarrollada por la sentencia *coram* Canals, de 21 de abril de 1970...» M. LÓPEZ ALARCÓN, *El «error qualitatis personae» en el consentimiento matrimonial según el nuevo Código de Derecho Canónico*, Murcia 1983, p. 26. For another study by the same author, one may consult *El error de cualidad en el consentimiento matrimonial*, in «XVIII Semana española de Derecho Canónico», Salamanca 1984, pp. 293-303.



ority -not only of consideration but also of degree- over the objective importance.

A. *Sentences which use a combination of Canals' interpretation and St. Alphonsus' third rule to recognize «error redundans»*

The decision given by Di Felice on March 26, 1977 seems to be the first sentence which clearly demands this double aspect. The cause was seen by five auditors, and the verdict was *pro nullitate* on the grounds of error of a quality which redounded in error of the person. The decision's *in iure* is a mixture of Canals' interpretation and St. Alphonsus' third rule. Although this combination of the two figures is taken up by later jurisprudence, its elaboration as presented in this cause is more extensive and better explained. For this reason, it may be useful to dwell a bit more on this sentence.

The facts of the cause concern the matrimony of Charles and Mary which took place on February 2, 1961. From the start, the matrimony was not very happy; even after the birth of a daughter things did not change. Charles, in general, thought little about his wife. When she became ill, he encouraged his wife to return to her mother, which she did in 1964. After March 19, 1966, he was never heard from again.

Mary received a legal separation in March of 1967, and after having found out that Charles was not a doctor (as she believed him to be), Mary started the process of nullity on July 27, 1970. The cause was first presented on the grounds of condition; later that of error was added. On May 22, 1972 the nullity was granted for error, but not for condition. Thus the cause was appealed by the Defender of the Bond and arrived to the Roman Rota⁴.

In the *in iure* part of the cause, the auditors quote canon 1083 § 2 of the 1917 code. They go on to discuss the various explanations of *error redundans* beginning with the strict interpretation as set forth by Sánchez and continue with St. Alphonsus' third rule⁵. The decision spends more

4. Cfr. c. DI FELICE, March 26, 1977, n. 1.

5. The text of the rule is badly cited in n. 3 of this sentence.

time speaking about St. Alphonsus' rule and pointing out some jurisprudence which has accepted this opinion⁶.

Afterwards, the sentence mentions Canals' interpretation citing the well-known affirmation that a person can be considered totally different based on the social, juridical or moral aspects of the individual. The *turnus* goes on to discuss those qualities which are extremely important in determining the person: qualities such as social condition, patrimony, family condition, and the status of the person. These qualities, in themselves or in the society in which one lives, are so esteemed as to be able to define specific persons⁷.

However, immediately after this assertion concerning the importance of these qualities, the sentence states: «one cannot forget that we are in the area of error, and therefore, we must give greatest importance to the will of the contractant, that is, to the value and importance which the contractant attributes to the determining quality which individualizes the person whom the contractant wishes to marry»⁸.

What this decision presents, then, is a double aspect from which the error of quality must be considered. One is the objective aspect which considers the quality as esteemed by society or by the general opinion of men. The other aspect is that of the contracting party, or better yet, the will of the contracting party; the task is to measure the importance of the quality as conceived in the mind of the one who erred and in the «mind» of the society or culture in general. In other words, is the quality socially or objectively important, and was this quality principally and directly intended by the contractant at the moment of giving consent?

6. Di Felice cites the decisions c. MANNUCCI, June 20, 1932 and c. Heard, June 21, 1941.

7. Cfr. c. DI FELICE, March 26, 1977, n. 4.

Another paragraph of the sentence states: «Persona ideo cum sit 'quoad omnes suas dotes' a Concilio considerata, atque cum personae coniugum, ita descriptae, pro intima eorum coniunctione foedere coniugali tradi debeant, error qualitatis, etiam non individualis et unius sed communis aliis personis, dummodo personam peculiari ratione determinantis, qui error sit dans causam contractui, redundare potest 'in errorem personae' iuxta can. 1083, § 2, n. 1, ideoque matrimonium irritare potest», c. DI FELICE, March 26, 1977, n. 5, *in fine*. The issue of *error causam dans* is addressed later in this study.

8. «Neque oblivioni dari potest, nos versari in provincia erroris, ideoque perquam maxime attendere debemus ad mentem contrahentis, idest ad valorem et momentum quod ipsa tribuit determinatae qualitati pro individuanda illa persona, quacum contrahere voluit», c. DI FELICE, March 26, 1977, n. 4 *in fine*.

These ideas are not innovative, but the combination is new. The Alphonsian rule had been invoked in previous sentences, and one of these decisions grants the nullity based on this concept alone⁹. Others consider it a solid solution but do not apply it. Judge Pinto considered it as one of three elements necessary for *error redundans*¹⁰.

Now again, the third rule becomes a requisite in order to have an error of quality which redounds in an error of the person. The difference is that the previous elements (which required that the spouses be unknown and that the quality only identify one specific person) have been replaced by the wider interpretation of the person according to the Canalian explanation. Though the sentence is not so explicit as to number the rules (and dividing them so clearly), it is evident that this is the reasoning it follows. This double aspect concerning *error redundans* becomes even more apparent when the law is applied to the facts of the cause. The auditors make it a point to prove that «the error of quality concerning the medical profession of the respondent...truly redounds in error of the person, be it for objective reasons be it for subjective reasons»¹¹.

The sentence then presents evidence to prove these two aspects were present. As for the argument that the quality of being a doctor is objectively important, the decision states: being a false doctor is different from being a doctor. Therefore, an error concerning the medical profession of a person is an error which redounds in the person himself, since a false doctor is completely different from a real one¹². Earlier in the sentence, the judges point out the importance and great esteem which the medical profession enjoys; doctors are considered to have an excellent juridical and social status in our day. For this reason, the judges conclude that feigning a medical diploma would certainly have grave consequences in family life¹³. Later in the cause, just before declaring the nullity on account of error, the sentence once again emphasizes the fact that the quality

9. Cfr. c. HEARD, June 21, 1941.

10. Cfr. c. PINTO, November 12, 1973, n. 11.

11. «Error qualitatis de arte medica conventi ... vere est redundans in errorem personae rationibus sive obiectivis sive subiectivis», c. DI FELICE, March 26, 1977, n. 10.

12. «Obiective igitur alia est persona medici, alia persona falsi medici; ideoque error qualitatis quoad artem medicam alicuius personae est error redundans in personam, quia persona falsi medici est prorsus diversa», c. DI FELICE, March 26, 1977, n. 10.

13. Cfr. c. DI FELICE, March 26, 1977, n. 10.

about which Mary erred is of great importance (*maximi momenti*) in present times¹⁴.

Pausing here for a moment, some observations can be made concerning this requisite. In short, how does one objectively define an important quality? When can one maintain without doubt that a particular quality is so highly esteemed in society that it makes the person totally different?

In this decision, it is maintained that the quality of being a doctor is extremely important, not only from the point of view of society, but also from the point of view of how it could affect family life. No doubt, this is true. However, upon studying this particular cause, the evidence seems to contradict this reasoning. That is to say, the reality that Charles was not a doctor, had no real impact upon the matrimony. The matrimony got off to a bad start and continued getting worse; but there was no cause and effect relation between the quality lacking and a poor matrimonial life. Mary lived with her husband for three years thinking he was a doctor, and when they separated, she still believed him to be a doctor.

Even in 1967, when Mary asked to receive a civil divorce, she continued thinking that Charles was a doctor, and this fact was recorded as such in the proceedings of the Civil Court¹⁵. As is evident, the matrimony did not break down (at least not primarily) because Charles lacked the desired quality.

Taking these facts into account, it would seem that the quality which was to be of such great importance in the eyes of society and in the general esteem of men, turned out to have relatively little influence -*in fact*- in matrimonial life.

In other words, from an objective point of view, it was completely indifferent that Charles was thought to be a doctor when he really was not one. The relationship between Mary and Charles did not suffer because of this error; there were no grave difficulties (objectively speaking) which resulted because of this inaccuracy. It would seem, then, that the rule of the objective importance of the quality is disproved. Or, at the very least, it seems to run into contradictory results.

14. Cfr. c. DI FELICE, March 26, 1977, n. 11.

15. Cfr. c. DI FELICE, March 26, 1977, n. 9.

The second aspect concerns the subjective esteem given to the quality by the contractant. Mary had asked for, and received, a civil separation in 1967, still believing Charles to be a doctor, but it was not until she realized her mistake, and it was precisely at this moment, when she pursued the Ecclesiastical nullity¹⁶. This manner of acting would seem to clearly indicate the will or intention she had in marrying. The plaintiff did not really consider the marriage null -at least in front of the Church- until she found out the truth about her husband not being a doctor. Therefore, the decisive moment occurs in the area of the subjective aspect of the error; that is, when the contractant realizes the mistake. Her intention was to marry a doctor¹⁷, and upon discovering that her husband was not a doctor, she considers the matrimony null and begins the nullity process.

Given these facts, it is evident that the subjective aspect had a much more profound effect on the matrimonial bond, not only from the subjective point of view of the wife, but moreover from the objective aspect of the matrimonial consent. In other words, the deeds would indicate that Mary not only wanted to marry a doctor, but she actually bound her matrimonial consent to marrying a person with this quality. The judges spend a good deal of time on this issue, and they give abundant evidence which supports this affirmation¹⁸.

The «double-requirement» interpretation of *error redundans* also appears in other decisions by the Roman Rota; here, a quick mention is made of those sentences which promote this interpretation with a brief commentary where appropriate.

It is not surprising to encounter another decision by Di Felice which encourages the same interpretation or reading of *error redundans*. In fact, in a sentence of January 14, 1978, the auditor specifically mentions the

16. «Cum vero mulier sciverit Carolum Edmundum non esse medicum, libello diei 27 iulii 1970 nullitatis matrimonium accusavit...», c. DI FELICE, March 26, 1977, n. 1.

17. «Iterum mentem suam pandit: 'Era mia volontà precisa sposare un medico'», c. DI FELICE, March 26, 1977, n. 8.

18. Cfr. c. DI FELICE, March 26, 1977, nn 8-12. The concept of a quality principally intended and its proof will be discussed in the following sections. Here it is simply mentioned in the context of the sentence being discussed. In fact, it could be pointed out that the evidence given proving that the wife directly intended to marry a doctor is more convincing and clearer than the «evidence» given to support the belief that being a doctor is an objectively important quality which affects the very person.

previous decision of March 26, 1977 and gives a summary of the arguments contained therein. Again, he reiterates the idea that the wide definition of the person (as proposed by Canals) is acceptable¹⁹. The sentence, in addition to citing Alphonsus' third rule, quotes passages from other Rotal decisions by Bejan and Ewers which speak about the importance of the will or intention of the contracting party. The judge considers these sentences, along with the one of March 1977, as those which adhere to the more ample interpretation of an error of a quality which redounds in the person²⁰.

There is a third and more recent decision by Di Felice which moves in the same direction and develops this double aspect with even greater clarity. The *ponens* speaks about the third rule of St. Alphonsus and indicates other decisions which have accepted this rule. He then highlights the aspect of the mutual self-giving of the two spouses which takes place in marriage, and afterwards speaks about the two pillars of error of a quality which redounds in the person.

The quality directly or principally intended by the contractant, in order that it really redound in the substance, must be objectively evaluated in the same way that it is esteemed by society under a social aspect and in the same way as it is required to constitute matrimonial life and to maintain the conjugal community, which has both a spiritual and corporal character (cf. Adhort. apost. *Familiaris consortio*, 32). In order that it constitute the object of matrimonial consent, however, the subjective determination of the contractant is required as well; that is, that he greatly values the quality and directly and principally intends the same²¹.

19. «Iamvero in una Augustona diei 26 martii 1977, videntibus quinque, ediximus errorem qualitatis redundantem in errorem personae, de quo in praefato canone statuitur, ampliori sensu accipi posse, prout est error qualitatis moralis socialis iuridicae, quae, etsi aliis communis, personam in sua natura individuali peculiari ratione designat», c. DI FELICE, January 14, 1978, n. 3. In the previous instance of this cause, the judge (Agustoni) clearly manifests himself against this interpretation.

20. It should be noted that this sentence of Di Felice also discusses the validity of an evolutionary interpretation of the law, canonical equity and the concept of *dolo*. It is interesting to note that this decision overturns two previous Rotal sentences.

21. «Qualitas directe et principaliter intenta a nupturiente, ut revera redundet in substantiam, obiective considerata est prouti a coetu hominum sub respectu sociali aestimatur atque prout exigitur ad constituendum consortium vitae coniugalis ac ad servandam coniugalem communionem, quae indolem simul spiritualem et corporalem habet (cf. Adhort. apost. *Familiaris consortio*, 32). Ad constituendum autem obiectum consensus matrimonialis requi-

This decision granted the nullity because the plaintiff erred concerning the marital status of her partner, which was considered an important quality²². Of course, the sentence mentions Canals' decision which maintains the same line of thought (a matrimony was declared null because one of the contractants was civilly married).

Judge Pompedda, in a decision on July 28, 1980, would also seem to promote this double aspect (objective and subjective) in order to appreciate an error of a quality which redounds in the person²³. Given this reasoning, the sentence must demonstrate the objective importance of the quality, and also, that this particular quality was principally and directly intended by the contracting party. The cause is very similar to one already seen. The plaintiff, Patricia, accuses her marriage because she thought her husband had a doctoral degree in Political Science and a socially important position²⁴; she charges the bond as null precisely when she finds out he did not hold a title in the medical profession. The tribunal decides in favor of the nullity.

As in the anterior cause, more importance and weight are given to the will or intention of Patricia than to the objective importance. The evidence for the latter is weak: the argument virtually becomes a tautology as the decision simply states that there is no denying the importance of an academic title whether one looks at it from the social point of view or from the viewpoint of matrimonial life²⁵. The reasoning is circular (i.e., the

ritur etiam subiectiva determinatio nupturientis, ut ipse magni faciat qualitatis compartis eamque directe et principaliter intendat», c. DI FELICE, November 16, 1985, n. 10, *in fine*.

22. «Qualitas, in qua erravit actrix ad coniugium ineundum, obiective considerata sub respectu sociali, prout a coetu hominum aestimatur atque exigitur ad constituendum consortium coniugale, maximi momenti est, cum statum liberum compartis respiciat», c. DI FELICE, November 16, 1985, n. 11. This is the first phrase of the *in facto* part of the cause.

23. «Quo posito principio, attentio iam poni debet super duobus elementis quae, Patrum sententia, definire valent irritantem errorem qualitatis redundantem in errorem personae, ex quibus alterum spectat *ad subiectum* seu contrahentem, alterum vero spectat *ad obiectum* seu qualitatem intentam», c. POMPEDDA, July 28, 1980, n. 2 *in fine*.

24. *Cfr.* c. POMPEDDA, July 28, 1980, n. 13.

25. «Certo qualitates et condiciones personales viri conventi iam obiective maximi ponderis sunt faciendae, eo potissimum si spectentur connexae et influxum substantialem exercentes in vitam coniugalem», c. POMPEDDA, July 28, 1980, n. 14.

«Ita nemo negare poterit titulum academicum necnon munus iam obtentum spectare ad qualitates substantiales personae ratione habita communitatis cum altera persona instaurandae necnon familiae condendae: idque nedum abstracte et in genere, sed reapse in casu concreto et in intentione mulieris», c. POMPEDDA, July 28, 1980, n. 17.

quality is important because it is important). Once again, from the objective point of view, the absence of the quality did not cause any marital problems as regards the *consortium vitae* which lasted for three years²⁶. The real break comes when Patricia realizes the true situation about Victor, her husband. He himself states that this was a key moment for Patricia; from this moment she considered her matrimony null²⁷.

Evidently, the subjective aspect carries more weight; this was the key moment in the fracture of the relationship while the objective importance is relegated to a very secondary or even completely unimportant place. Little (or nothing) was said about the effect the absence of this quality had on the relationship between the couple. Patricia and Victor lived together for three years without her thinking of Victor as a «completely different person». But still, despite these facts, the sentence seems to want to recognize the error as affecting the very substance of the respondent and therefore making the consent null²⁸.

It would seem that the appreciation of this substantial change in the person is precisely what makes this objectiveness so difficult. The criteria for this «objectification» never seems to solidify into concrete rules²⁹. The «problem» seems to center around the reluctance of the jurisprudence to «let-go» of the classical notion of *error redundans*, especially in what refers to the physical person. In this regard, one could say that Canals' famous decision of 1970 is accepted and rejected. As has been mentioned, it received some heavy criticism and led to some contradictory decisions. However, the concept that the person should be considered in his/her totality remained in subsequent jurisprudence. Rotal judges were reluctant to give up this «tangible» aspect of *error redundans* and put all of the

26. Cfr. c. POMPEDDA, July 28, 1980, n. 1.

27. The husband declares: «Quando mia moglie venne a conoscenza di questi fatti, la sua prima reazione fu scioccante ... dopo el choc iniziale, l'azione di mia moglie è stata più cosciente, ... Faccio notare che Patrizia, al momento della mia reale situazione, aveva detto a D. Ottavio, me presente, che avrebbe chiesto l'annullamento del matrimonio», c. POMPEDDA, July 28, 1980, n. 12.

28. «Pressius utcumque videre debemus an error reapse adfuerit idemque substantialis idest afficiens ipsam personam conventi atque dein an exinde consensu praestiti nullitas certo sequatur», c. POMPEDDA, July 28, 1980, n. 12 *in fine*.

29. Delgado also mentions the problem of objectively classifying a certain quality. Cfr. G. DELGADO, *Error y matrimonio canónico*, Pamplona 1975, pp. 152-165. This work also deals with some of the jurisprudence dealt with in this study.

nullifying power in the area of the intention of the contracting parties. Surely, this reluctance stemmed from the influence of the classical doctrine concerning *error redundans* (that an accidental quality could not nullify a marriage) and the classical concept of the matrimony as the *ius in corpus*.

B. *Changes in the concept of matrimony which have influenced the notion of «error redundans»*

Before entering into a detailed study of St. Alphonsus' third rule and how it was used in Rotal jurisprudence, this section briefly mentions some of the changes in focus concerning key elements of matrimony which were introduced with Vatican II. These ideas help to better understand the concept of a quality principally and directly intended.

As is well known, in the former concept of matrimony, the primary emphasis or foundation was based on the *ius in corpus*. Therefore, the most important aspect of the matrimonial bond was the physical person and the rights and obligations which revolved around this specific aspect of the matrimonial alliance. For this reason, it is not surprising that one sentence, which adheres to the strict interpretation, considers the physical persons to be the material object of matrimony while the formal object includes the rights and obligations concerning the *ius coeundi* ³⁰.

However, after the advent of Vatican II, a new emphasis is placed on the mutual self-giving of the spouses by means of an act of the will. The Council teaches that the conjugal community is established with the personal and irrevocable consent of the contracting parties³¹, and it is by this human act that the spouses mutually give and receive one another³². The Council clearly states that marital consent includes this mutual self-giving

30. «Quare consensus matrimonialis pro *obieto materiale* habet physicas ipsas contrahentium personas, pro *obieto formali*, seu essentiali, ius et officium mutuum in corpus seu ius coëndi», c. FERRARO, July 18, 1972, n. 20.

31. The first sentence of *Gaudium et Spes*, n. 48, thus states: «Intima communitas vitae et amoris coniugalis, a Creatore condita suisque legibus instructa, foedere coniugii seu irrevocabili consensu personali instauratur».

32. «Ita actu humano, quo coniuges sese mutuo tradunt atque accipiunt...». *Gaudium et Spes*, n. 48.

and acceptance in order to establish this «*communitas vitae et amoris coniugalis*».

Evidently, Roman auditors are confronted with a new focus and emphasis in what pertains to the essence of the matrimonial bond. The marital consent, an act of the will by which the spouses mutually receive and give themselves to the other, is once again acknowledged and confirmed as the origin of the matrimonial bond.

What is interesting to point out is that the object of this consent embraces much more than the *ius in corpus*³³. Surely this aspect of matrimonial life is included here, but there is a greater emphasis on the «*consortium totius vitae*»: the sharing of a common and lasting lifetime partnership. This line of thought is clearly and concisely assumed by the legislator in canons 1055 § 1 and 1057 § 2.

Judge Serrano makes reference to this evolution of thought as proposed by Vatican II. He believes that the formal object of consent is no longer simply the perpetual and exclusive *ius in corpus*. After Vatican II, the matrimonial consent also includes the right to a conjugal life and its corresponding obligations³⁴. With this brief discussion about the new focus of matrimonial consent, it will be easier to understand the concept of a quality principally and directly intended as used in Rotal jurisprudence.

33. For a work about the essence of matrimony Cfr. E. MOLANO, *Contribución al estudio sobre la esencia del matrimonio*, Pamplona 1977. Specifically concerning the evolution of thought about the *ius in corpus* Cfr. pp. 223-226.

34. «Sed cum sub luce et inspiratione Concilii Vaticani II clarius ac praecisius -potius quam diverse- essentia matrimonii intelligeretur, personae coniugum potiore quam litigime habent, in pacto accipiunt partem ex magis completa notione s.d. obiecti consensus coniugalis: "Rectius itaque consensus matrimonialis definitur: actus voluntatis quo vir et mulier foedere inter se seu irrevocabili consensu constituunt consortium vitae coniugalis, perpetuum et exclusivum, indole sua naturali ad prolem educandam et generandam ordinatum'.

»'Obiectum' exinde 'formale' istius consensus est non tantum ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem, excluso omni alio elemento formali essentiali, sed complectitur etiam ius ad vitae consortium seu communitatem vitae, quae proprie dicitur matrimonialis, necnon correlativas obligationes, seu ius ad 'intimam personarum atque operum coniunctionem', qua 'se invicem perficiunt ut ad novorum viventium procreationem et educationem cum Deo operam sociant' (Enc. *Humanae Vitae*) [cfr. S. R. *Rotae Decis.*, vol. LXI (1969) 183-184; in una coram ANNÉ, diei 25 februarii 1969]», c. SERRANO, May 28, 1982, n. 15.

C. *A Brief History of St. Alphonsus' Third Rule in older Rotal Jurisprudence*

While the Canalian interpretation of *error redundans* received a fair amount of criticism and led auditors to opposing interpretations and a certain uncertainty concerning the appreciation of a quality which re-dounds in the person, another, but by no means new, interpretation began to spring up and form a distinct current: St. Alphonsus' third rule.

The Third Rule of St. Alphonsus reappeared and was frequently quoted even before the promulgation of the new code. Some decisions -but it is not an exhaustive list- which mention this rule include: c. Canals, April 21, 1970 (n. 2), c. Ewers, February 10, 1973, (n. 3)³⁵, c. Pinto, November 12, 1973, (n. 11)³⁶, c. Di Felice, March 26, 1977, (n. 3)³⁷, c. Ferraro, July 18, 1972, (n. 14)³⁸, c. Agustoni, October 15, 1976, (nn. 7-8), c. Di Felice, January 14, 1978, (n. 3), c. Pompedda, November 25, 1978, (n. 7), c. Stankiewicz, February 15, 1980, (n. 5), c. Serrano, May 28, 1982, (n. 8)³⁹, c. Stankiewicz, February 24, 1983. As is obvious, this «Third Rule» has had a great impact on the more recent jurisprudence.

Precisely because this interpretation has been adopted by the new code, it is worthwhile spending some time studying older but frequently cited jurisprudence from earlier years which also accepts this rule. In particular, there are four interesting decisions by William Heard, the first Roman auditor to declare a matrimony null on the grounds of a quality principally and directly intended. Since both doctrine and jurisprudence often quote, comment, and criticize these decisions (especially the one of June 21, 1941), and because these sentences are precursors to the jurisprudence which follows, it is important, even if in general terms, to be familiar with the arguments presented in these causes.

35. This judge does not explicitly mention St. Alphonsus, but he does speak about a quality principally intended.

36. Judge Pinto cites the third rule, but considers it an implicit condition.

37. In this sentence, the text of the third rule is badly cited.

38. This judge seems to accept the rule of St. Alphonsus as valid. However, he points out that it would be difficult to prove in the external forum. As has been noted, this judge, in deciding the cause, applied the strict interpretation of *error redundans*.

39. This auditor rechannels the third rule of St. Alphonsus to a condition.

1. *The Decision «coram» Heard, June 21, 1941*

Along with the sentence given by Canals on April 21, 1970, this is probably one of the most important pieces of jurisprudence dealing with the chapter of error of the person⁴⁰. The facts of the cause concern a man, who in keeping with the traditions of his country (Pakistan), commissions a third party to look for an eligible person with the specification that she be virgin. After encountering a girl believed to have the desired quality and the future husband having seen the bride-to-be, the price for a virgin is paid out (as specified by the local custom), and Eleazar Somra and Imelda Etowari were married. However, upon discovering that his wife was deflowered, Eleazar immediately rejected Imelda, not only in words, but also in deeds.

The *in iure* of the sentence cites canon 1083⁴¹ and then quotes the three Alphonsian rules to help in the difficult matter of determining when an error of quality redounds in error of the person. Two observations are made concerning this third rule, that is, when the contractant directly and principally intends the quality and less principally the person. First, it is extremely difficult to prove such an intention in the external forum unless it were formulated as a condition or pact, but nevertheless, it is not absolutely excluded that, in certain circumstances, a prevailing intention can obviously be demonstrated. The second observation is that canon 1083 (of the 1917 code) does not require proof of a condition or a pact, and clearly insinuates that there might exist another way (*alia via*) or manner of proving, even in the external forum, that an error of quality becomes an error concerning the person⁴².

40. The references to this sentence in Rotal jurisprudence and doctrine are manifestly known; for this reason the cause is commented in some detail. As an example, Prof. A. Mostaza says of this cause: for the first time in history, a matrimony is declared null because of error of a common quality. Cfr. A. MOSTAZA, *El error doloso como causa de nulidad del matrimonio canónico*, in «Trabajos de la XV Semana de Derecho Canónico», Salamanca 1976, p. 154.

41. The text of the sentence mistakenly says «Ex. can. 1013», c. HEARD, June 21, 1941, n. 2.

42. «Verum quidem est in foro externo vix fieri posse quod talis intentio probetur et admittatur, quin fuerit in conditionem deducta vel pactum; sed non est absolute exclusum dari casum in quo, per circumstantias, praevalens intentio valeat demonstrari. Citatus canon 1083 dum ponit errorem circa qualitatem personae matrimonium dirimere quoties 'error qualitatis redundet in errorem personae' et silet omnino de necessitate habendi conditionem

Applying the law to the facts of this matrimonial cause demonstrates this «other way». Taking into account the circumstances and the local customs which govern marriage, the sentence declared that Eleazar Somra directly and principally intended the quality of virginity in the woman who was to be his wife more than the woman herself. The following evidence is given:

i) Before the wedding.

According to local custom, women are divided into two very distinct categories: virgins and widows. The price of «buying» and marrying a virgin is 20-25 rupees while the price of a widow is 12 rupees⁴³. Eleazar paid the price for a virgin.

ii) At the moment of the marriage.

There is no doubt that Eleazar was certain about the desired condition of his spouse. The sentence describes the match-maker as an honest man who was himself deceived by the tutor of Imelda⁴⁴.

iii) After the marriage.

«In this case, that the matrimony is to be held as null because of the will prevalently tending to a virgin more than a woman is clearly evident from the dismissal of the woman, the restitution, with a fine, of the price paid and the expulsion from the caste»⁴⁵. In addition to these facts, several declarations of Eleazar are gathered which clearly indicate his mind in marrying:

«How reluctant Somra was about accepting a non-virgin is best shown from his manner of acting immediately upon receiving the news of Imelda's pregnancy: «I stipulated that she never return to me; she never did return. I complained to my uncle about her and told him I would never reclaim the girl. I said these things in order that I be free from the matrimonial bond. I went to a missionary and told him, 'I will never accept that girl as a wife'»⁴⁶.

Basing its decision on these facts, the tribunal declared the marriage null on the grounds of error redounding in error of the person (canon

aut pactum ad id probandum, clare insinuat et aliam viam patere posse ad ostendendum etiam in foro externo errorem qualitatis in personam verti», c. HEARD, June 21, 1941, n. 2 *in fine*.

43. Cfr. c. HEARD, June 21, 1941, n. 4.

44. Cfr. c. HEARD, June 21, 1941, n. 5.

45. C. HEARD, June 21, 1941, n. 5.

46. C. HEARD, June 21, 1941, n. 5.

1083 § 2, 1°). The error suffered by the petitioner did not concern a quality which would identify one unique person nor did it specifically identify Imelda for Eleazar, but rather, the error concerned a common quality greatly desired by the husband to the point of being principally and directly intended as part of the marriage contract. As one author points out, we would now be confronted with a ratification of the well-known formula of St. Alphonsus, that is to say, we now have a new way of interpreting *error redundans* which is distinct from mere *error qualitatis*⁴⁷.

It may be observed that Heard's use of St. Alphonsus' rule was not passively accepted in all the canonical circles. Fedele comments this decision in an article published in 1953. Even though the Italian canonist does not feel that the sentence erred in granting the nullity, he does consider that the sentence has confused or mixed the concepts of error, intention and condition. *Error redundans*, for Fedele, will rarely occur since he requires (as the classical doctrine does) that the spouses be unknown and that the person be determined by the desired quality⁴⁸.

2. The Decision «coram» Heard, August 7, 1948

This is a short cause which has raised some speculation as to the auditor's adherence to St. Alphonsus' doctrine.

Edward and Elsa were married on September 17, 1935. Soon after the wedding, Edward finds out that his wife had been sterilized; he immediately leaves her and obtains a civil divorce. In 1939, the husband seeks an annulment in Ecclesiastical court for fear and error. The grounds of fear is rejected, but the nullity is granted for error. When the cause is appealed, the first instance decision is overturned, and the marriage is de-

47. «Estaríamos, por tanto, ante una ratificación de la conocida fórmula de S. Alfonso M. de Ligorio, es decir, ante una nueva forma de interpretar el *error redundans*, como distinto del simple *error qualitatis*». T. RINCÓN, *La «Qualitas» y el «Error in Personam»*, in «Ius Canonicum» 12 (1972), p. 354.

48. Cfr. P. FEDELE, *Analisi di recenti sentenze ecclesiastiche in tema di nullità di matrimonio*, in «Ephemerides Iuris Canonici» 9 (1953), pp. 399-400.

Other articles concerning error by this canonist include the following: *Il tema de error qualitatis redundans in errorem personae*, in «Ephemerides Iuris Canonici» 10 (1954), pp. 304-312; *Error qualitatis redundans in errorem personae*, in «Il Diritto Ecclesiastico» (1934), pp. 175-202; *Ancora in tema di «error qualitatis redundans in errorem personae»*, in «Ephemerides Iuris Canonici» 6 (1950), pp. 149-155.

clared valid. Thus the case arrives to the Roman Rota in third instance for a final decision concerning the chapter of error.

In setting forth the principles of law, the *ponens* maintains that canon 1083 § 2 «cannot really be distinguished from the error which is dealt with in the first paragraph, since then it (error redounding in error of the person) would only come about when dealing with a quality which is proper to one person and which is precisely intended»⁴⁹. Taken by itself, this comment would seem to contradict what Heard maintained in the previous decision studied, and it appears that he now favors the traditional doctrine or Sánchez's strict interpretation of *error redundans*. Mostaza, classifying this sentence as one which rejects the third Alphonsian rule, cites this passage to show that Heard has either changed opinion or contradicts himself⁵⁰.

Although Prof. Mostaza's argument is a strong one, there is evidence that the previously quoted statement of the Roman auditor does not necessarily undermine or openly contradict what he maintains in the cause of June 21, 1941. In the first place, there is no mention of St. Alphonsus' rules in the decision we are studying. Heard simply asserts that canon 1083 § 2, when interpreted in the strict sense, is a corollary of the first paragraph of the same canon, and therefore, the two are substantially the same⁵¹. He makes no reference to the *aliam viam* mentioned in the 1941 sentence.

Moreover, the auditor afterwards speaks about error of a quality which does *not* redound in the person but *does*, however, have the power to make the marriage void. This happens «when the quality was categorically placed in the same way as (*tanquam*) a condition *sine qua non*. For,

49. «Sed iste error qualitatis redundans in errorem personae revera non distinguitur ab errore de quo in paragrapho prima, nam tunc tantum habetur quando versatur circa qualitatem quae uni personae propria est ac quae praecise intenditur», c. HEARD, August 7, 1948, n. 2.

50. «Y en la segunda c. HEARD se contradice paladinamente lo afirmado en la famosa causa de Dinajpur de 21-VI-1941, ante el mismo Auditor, ya que se nos dice, con la doctrina tradicional, que el error redundante no se distingue del error sobre la persona...». A. MOSTAZA, *El error doloso como causa de nulidad del matrimonio canónico*, en «Trabajos de la XV Semana de Derecho Canónico», Salamanca 1976, p. 163.

51. Part of the doctrine has maintained the same idea. Cfr. J.M. MANS PUIGARNAU, *El error de cualidad en el matrimonio ante la reforma del código de derecho canónico*, Barcelona, 1964, p. 14.

one who acts in such a manner principally desires the quality, and therefore, if the quality is lacking, there is no consent»⁵².

As can be seen, the sentence maintains that error of a quality which is principally intended affects the very matrimonial consent. Heard is not speaking about a quality which redunds in the person (*error qualitatis redundans in errorem personae*) which he previously discussed in this cause, rather he is now referring to a quality principally intended which he likens to a condition *sine qua non*. The auditor uses two different terms for two different concepts, both of which have a voiding effect upon the matrimony⁵³.

Perhaps what would be more difficult to explain is the reason why Heard reverts to or includes the case of condition in his argument. It could be that the first instance decision, which the Auditor quotes, includes this chapter in its reasoning. It may be that he supports himself in the figure of condition (which was recognized by the code as a valid chapter of annulment) to better explain a «*qualitas principaliter volita*» since, as was noted, his well-known decision of June 21, 1941 was submitted to some early criticism. In any case, it seems that Heard is moving in the area of an error which has a direct influence upon the will and not in the field of *error redundans* taken in the *strict sense*.

For these reasons, it appears that this sentence is not a flat-out rejection of the third Alphonsian rule. In fact, Heard uses the principles of this rule (although he likens it to a condition) to solve the cause. The *ponens* points out that the plaintiff did not have this quality in mind, nor did he have any preconceived ideas about his partner concerning this quality⁵⁴.

52. «Error circa qualitatem quae non redundat in personae tunc tantum matrimonium irritat cuando haec qualitas praecise posita fuit tanquam conditio sine qua non, nam qui sic facit, qualitatem principaliter vult, ideoque deficiente qualitate deest consensus», c. HEARD, August 7, 1948, n. 2. Prof. Mostaza also cites this text in his critique of the sentence being studied.

53. Disentangling terminology and concepts in the area of *error facti* has often been a stumbling block in jurisprudence and doctrine. Cfr. V. DE REINA, *Error y dolo en el matrimonio canónico*, Pamplona 1967, pp. 108-122. Also A. MOSTAZA, *El error doloso como causa de nulidad del matrimonio canónico*, en «Trabajos de la XV Semana de Derecho Canónico», Salamanca 1976, pp. 157-160.

54. Cfr. c. HEARD, August 7, 1948, n. 3.

3. The Decision «coram» Heard, November 12, 1955

Heard's decision of 1955 adheres to the opinion that an error of quality voids the marriage only if this quality identifies one specific person or if the quality was placed as a condition *sine qua non*. In this latter case, though, the *ponens* maintains that one has moved into a new chapter of nullity (that of condition)⁵⁵.

That the *ponens* focuses this particular cause in terms of condition is evident in both the *in iure* and *in facto* parts of the sentence. He esteems that the plaintiff's intention to marry a virgin should be classified as a mere proposition, but not as a condition⁵⁶.

It would seem, therefore that this sentence (even more than the previous one) indicates a change of opinion on the part of Judge Heard. He openly redirects the entire cause to the figure of condition (in his opinion, a completely different chapter of nullity) even though the marriage was accused on the grounds of error. At the same time, it is interesting to note that he does not mention the third rule of St. Alphonsus as a valid interpretation of error of quality⁵⁷.

4. The Decision «coram» Heard, January 14, 1956

This is the fourth and last decision to be studied by Judge Heard. The decision deals with a couple who lived together ten years before contracting marriage. In order not to scandalize his mother and sister who came to live with the couple, Sanctus, the husband, decides to marry Josephine; the wedding takes place on June 28, 1943.

55. «Error circa qualitatem personae, etsi dans causam contractui, non irritat, nisi in errore personae redundet: quod evenire nequit, nisi versetur circa qualitatem uni personae propriam. Qui ergo vult ducere virginem, et, ex errore, ducit scortum, valide contrahit, nisi virginitatis qualitas ut *conditio sine qua non* posita fuerit, sed, hoc in casu, contractus irritus fit *non vi erroris* (can. 1083), sed *vi conditionis appositae et non verificatae* (can. 1092)», c. HEARD, November 12, 1955, n. 2.

56. «Sed sub 'questa idea', de qua actor, vix et ne vix quidem intropici potest conditio, sive generalis, sive circa matrimonium de quo agitur, sed merum propositum ... Idest, sicut alii homines honesti, propositum habuit ducendi virginem», c. HEARD, November 12, 1955, n. 3. *Cfr.* as well n. 4.

57. As was mentioned already, this may be due to the early criticism which his 1941 decision received, as well as the fact that condition was recognized in the 1917 code as having nullifying power.

Because it was impossible to obtain the necessary documents for Josephine in order to marry, the couple went to a public notary. There, Josephine affirmed to have been born in 1906 of noble parentage and that her father was a lawyer. After the war, Josephine having suffered a fractured thigh and being convalescent in a hospital, Sanctus leaves for another city and solicits authentic documentation concerning the true age and social status of his wife. Sanctus then accuses the bond on grounds of error concerning a quality redounding in error of the person since Josephine was not the daughter of a noble family nor was her father a lawyer. He also accuses the matrimony because of a non-verified condition concerning the age of his wife. The first instance court declared the matrimony valid⁵⁸.

Judge Heard, after asserting that *error causam dans* does not nullify marriage, states: «At times, however, in the mind of the contracting party, the notion of the person cedes to the notion of the quality to such a degree that the quality is substantially intended while the person only accidentally. In this case, error concerning a quality becomes substantial, that is, it redounds in error of the person»⁵⁹. With these words, Heard describes when an error concerning an accidental quality can substantially affect the consent to the point of voiding the matrimony.

Immediately afterwards, the decision continues: «This error, though, can scarcely be conceived unless it is between spouses who beforehand were personally unknown to each other, such that, only through the quality was the person known»⁶⁰. The sentence continues citing a well-known text of Gasparri asserting that simple error of quality which is the cause of the contract does not affect the validity unless it were placed as a condition *sine qua non* ⁶¹.

58. Cfr. c. HEARD, January 14, 1956, n. 1.

59. «Aliquando, vero, in mente contrahentis ratio personae adeo cedit rationi qualitatis, ut haec substantialiter, illa vero nonnisi accidentaliter intendatur, quo in casu error circa qualitatem substantialis fit, seu redundat, in personam», c. HEARD, January 14, 1956, n. 2. This paragraph is very frequently quoted in subsequent jurisprudence.

60. «Qui tamen error vix concipi potest, nisi inter sponsos antea invicem personaliter prorsus ignotos, ita ut, per qualitatem tantum, persona cognoscatur», c. Heard, January 14, 1956, n. 2.

61. C. HEARD, January 14, 1956, n. 2, *in fine*.

Once again, there is a certain mixture of ideas and terms. On the one hand, the Rotal sentence recognizes that, at times, the contracting party's intention may be so vehemently directed towards the quality that this quality becomes a substantial part of the will; this binding of the will to the quality is so strong that when this quality is lacking there is no consent. In this decision, Heard classifies this error as redounding in the person: «*quo in casu error circa qualitatem substantialis fit, seu redundat, in personam*». This reasoning seems to favor the line of thought as given by St. Alphonsus' third rule. On the other hand, the decision continues by saying that such an error can hardly be conceived unless the spouses are personally unknown to each other. This favors Sanchez's school of thought. And finally, the concept of a condition *sine qua non* is brought into play. What doctrine or school of thought, then, does this sentence promote as apt for solving the cause? Does the auditor favor the strict interpretation of *error redundans* or does he put more weight on the will of the person? How does condition fit into all of this?

A look at how the law is applied to the facts of the cause may help to answer some of these questions. In this section of the sentence, it is first demonstrated that the plaintiff did not enter into marriage with a condition concerning the nobility of his spouse's family nor the profession of her father. He married to avoid a scandal with his own family or perhaps for a religious motive⁶².

With the case of condition being rejected, it is significant that the sentence does not simply reject the possibility of error because the spouses knew each other for ten years before marrying. Proceeding in this manner would indicate that the auditor is partial to the strict interpretation of *error redundans*. Instead, Judge Heard cites a passage of the first instance sentence which explicitly invokes the third Alphonsian rule as grounds for declaring the nullity. In response, the Rotal sentence makes evident that one is not in the area of a quality principally intended, but rather in the area of *error causam dans*, using the following testimony of the husband: «I admit that these (the qualities) were determining factors

62. Cfr. c. HEARD, January 14, 1956, n. 3.

which induced me to marriage»⁶³. The qualities desired by the petitioner in marrying, in the opinion of Heard, were too trivial to form the prevalent or pervading object of the will⁶⁴; the verdict is *non constare de nullitate matrimonii, in casu*.

One final observation may be worth noting. Even though in the *in iure* part of this cause there is a certain tendency to liken or virtually equate the figures of *error in qualitate directe et principaliter intenta* and condition *sine qua non*, the *in facto* part of the sentence resolves them as two separate questions or chapters of nullity.

Thus, Judge Heard was the first Rotal auditor to actually invoke the third Alphonsian rule in order to nullify a matrimony⁶⁵. The decision was widely commented and often criticized. Despite this cool reception, Heard, in two subsequent causes, maintains that an error of quality principally and directly intended is a valid grounds for declaring a matrimony null.

These decisions serve as an introduction to the topic of error of quality principally and directly intended; they present the main arguments and complications concerning this chapter of nullity. A study of more recent jurisprudence should help to better understand what the Rota is proposing as valid solutions and limits for this juridical figure.

D. *A quality principally and directly intended*

While some Rotal decisions demanded that the quality be subjectively desired and objectively important, other sentences began putting more stress and attention on a quality principally intended by one of the contractors. Many auditors quote St. Thomas' famous passage concerning a woman who consents to marry the son of the king (whoever he may be)

63. «...confermo che esse furono determinanti ad indurmi al matrimonio...», c. HEARD, January 14, 1956, n. 3.

64. «Ceterum, qualitates, de quibus agitur: idest, aliqua propinquitas collateralis cum nobili familia C., et titulus advocati a patre conventae obtentus, nimis triviales sunt, ut possint praevalentis voluntatis obiectum formare», c. HEARD, January 14, 1956, n. 3, *in fine*.

65. Two previous Rotal decisions had explicitly mentioned this juridical figure, but they did not decide in favor of granting the nullity. The decisions were c. MORI in 1910 and c. MANNUCCI, June 20, 1932.

and the third rule of St. Alphonsus concerning a person who specifically desires to marry a noblewoman; other auditors cite the innovative decision of Heard in 1941⁶⁶.

The overall importance of the contractant's intention becomes more and more evident even before the Code of 1983. One auditor boldly contradicted the classical doctrine maintaining that firm and proven jurisprudence of the Roman Rota accepts an error of an accidental quality as capable of nullifying a marriage. When the quality is of great importance for the contracting party, it may well redound in error of the person⁶⁷. However, this concept was not previously unknown. A text by Heard which has already been mentioned appears many times in the decisions concerning this study. The text reads as follows: «At times, however, in the mind of the contracting party the notion of the person cedes to the notion of the quality to such a degree, that the quality is substantially intended while the person only accidentally. In this case, error concerning a quality becomes substantial, that is, it redounds in error of the person»⁶⁸. This same paragraph is later used by Bejan in a decision of July 16, 1969⁶⁹, and is cited by Ewers⁷⁰, Di Felice⁷¹,

66. Some sentences which turn to support in St. Thomas, St. Alphonsus or Heard's decision include: c. AGUSTONI, October 15, 1976, n. 7; c. POMPEDDA, November 25, 1978, n. 7; c. POMPEDDA, July 23, 1980, n. 5; c. STANKIEWICZ, February 24, 1983, nn. 3-4; c. PARISELLA, June 16, 1983, n. 25; c. JARAWAN, December 18, 1984, n. 2; c. STANKIEWICZ, January 24, 1984, n. 7; c. COLAGIOVANNI, November 22, 1983, n. 15; c. STANKIEWICZ, December 19, 1985, n. 14.

67. «Unde sat firma atque probata censenda est iurisprudencia N.F. pro interpretatione erroris qualitatis accidentalis magni momenti in aestimatione nupturientis prout redundantis in errorem personae, ex quo matrimonium irritum fit», c. DI FELICE, January 14, 1978, n. 4 *in fine*.

68. «Aliquando, vero, in mente contrahentis ratio personae adeo cedit rationi qualitatis, ut haec substantialiter, illa vero nonnisi accidentaliter intendatur, quo in casu error circa qualitatem substantialis fit, seu redundat in personam», c. HEARD, January 14, 1956, n. 2.

69. Cfr. c. BEJAN, July 16, 1969, n. 11, which literally quotes the text of Heard adding at the beginning: «Haud infitiamur quod, aliquando, in mente contrahentis...». Bejan, citing Heard's 1956 decision, later mitigates his stance by stating that this error could exist only between spouses who were unknown to each other or by redirecting this figure into a condition *sine qua non*. Heard's stance concerning this aspect was already treated in the previous section.

70. Cfr. c. EWERS, February 10, 1973, n. 3.

71. Cfr. c. DI FELICE, January 14, 1978, n. 4.

Huot⁷², and Giannecchini⁷³ all of whom attribute the text to Bejan. As is obvious, this passage has had a fairly big influence on Rotal jurisprudence, and for this reason it is highlighted here again.

The trend is clear. Rotal jurisprudence began accepting the idea that an accidental quality, when directly and principally intended, could nullify a marriage because the error redounded in the person, or in other words, because of substantial error. This current is present in Rotal jurisprudence all through the 1970s and up to the present. Canals specifically cites the third rule of St. Alphonsus as a valid case for nullity⁷⁴, and in 1976, Agustoni approvingly cites Heard's decision of 1941⁷⁵. In 1980, Judge Pompedda proposes a truer and more probable interpretation of canon 1083 § 2, 1°: a marriage is void when the contractant directly and principally aims his/her consent towards the quality, and indirectly and subordinately towards the person⁷⁶. Judge Stankiewicz makes reference to the decision c. Mori in 1910 (which seems to be the first decision recorded to have cited St. Alphonsus' rule), and he then goes on to speak about the «truer» and «more probable» interpretation of canon 1083 § 2, n. 1° proposed by Pompedda. Stankiewicz adds that both doctrine and jurisprudence have always considered this type of error an impeding factor in the matrimonial bond⁷⁷.

72. Cfr. c. HUOT, November 24, 1987, n. 32.

73. Cfr. decree, c. GIANNECCHINI, March 25, 1983 in F. DELLA ROCCA, *Diritto Matrimoniale Canonico: tavole sinottiche. Secondo volume di aggiornamento*, pp. 117-118.

74. Cfr. c. CANALS, April 21, 1970, n. 2.

75. Cfr. c. AGUSTONI, October 15, 1976, n. 7.

76. «Verior igitur atque magis probabilis videtur canonis interpretatio, iuxta quam error qualitatis in errorem redundat, ubi ipsa *qualitas prae persona intenditur*, idest ubi contrahens directe et principaliter suum consensum dirigit in qualitatem vel qualitates determinatas, indirecte autem et subordinate in personam», c. POMPEDDA, July 23, 1980, n. 5.

77. «At saecularis traditio canonica (Cfr. nn. 3 et 6 d. 3^a) nec non iurisprudentia N. Fori tenent errorem circa qualitatem directe et principaliter intentam matrimonii nullitatem secumferre». The *ponens* continues: «Profecto «cum consensus directe et principaliter latus fuerit in determinatam qualitatem, hac deficiente habetur error substantialis, qui irritat matrimonium» [S.R. *Rotae Decis*, vol II (1910) 337, n. 2, coram Mori]. C. STANKIEWICZ, February 24, 1983, n. 7.

The passage by Mori is also cited in the sentence C. JARAWAN, December 18, 1984.

1. *Relative importance of the objective aspect and absolute importance of the subjective aspect*

The judicial current of a quality principally and directly intended began gaining a wider acceptance in Rotal jurisprudence while the requisite that the quality be objectively important began fading and even received some direct criticism. The double aspect, however, was not completely abandoned by Rotal judges. As is obvious, there is no abrupt cut with the one interpretation to take up the other. Some judges continued resorting to the objective importance as a requisite for *error redundans*, but the fact is that more and more attention and significance was being attributed to the subjective aspect. In other words, it seems that Rotal auditors began giving greater emphasis to what the contractant thought about the quality than to what society or men in general thought about the same quality.

This manner of thinking can be perceived even among auditors who promote the double requirement for *error redundans*. As was already mentioned, despite what Judge Di Felice maintains about the importance of the quality looked at from a social point of view, he adds an important qualifying observation: «One must not forget that we are in the area of error, and therefore, we must give the utmost attention to the will of the contractant, that is, to the value and importance which the one marrying attributes to a specific quality for individualizing the person he wants to marry»⁷⁸.

Judge Huot would seem to be another who demands that the quality be objectively important as well as subjectively desired⁷⁹. However he, like Di Felice, puts greater importance on the subjective aspect. This audi-

78. «Neque oblivioni dari potest nos versari in provincia erroris, ideoque perquam maxime attendere debemus ad mentem contrahentis, idest ad valorem et momentum quod ipsa tribuit determinatae qualitati pro individuanda illa persona, quacum contrahere voluit», c. DI FELICE, March 26, 1977, n. 4 *in fine*.

This same text is cited by COLAGIOVANNI, November 22, 1983, n. 16 with the introduction: «At sapienter additur in novissime citata sententia», and concludes with the following: «ita ut causa dari possit in quo alii ob illam determinatam qualitatem in comparte a matrimonio deterreantur, alius vero ab illam contrahat».

79. «Qualitas vero hic non solum quae objective magni sit ponderis considerari debet sed etiam quae in mente contrahentis maximi fit atque directe et principaliter intendatur. In provincia enim erroris versamur», c. HUOT, November 24, 1987, n. 29. He continues quoting the passage from DI FELICE in the previous footnote.

tor points out that the subjective evaluation of the quality desired may not necessarily be in accordance with the objective value or importance given to this same quality by society. The *ponens* continues with an interesting commentary by O. Fumagalli-Carulli. She maintains that it is of little importance whether or not society greatly esteems a quality which a person has directly and principally intended. What does matter is the subjective evaluation of the contractant. Therefore, an error of quality redounds in the person in as much as the quality substitutes the physical individual in the intention of the contractant⁸⁰.

Judge Palestro, in a decision of June 24, 1987, shows himself to be of the same opinion concerning the relative importance of the quality objectively considered. One must consider, in the opinion of this Roman auditor, the subjective evaluation of the quality by the contractant more than the objective evaluation by society or the *universalissimam cognitionem*⁸¹. The *ponens* explicitly states that one «should acknowledge the prevalence of the subjective evaluation over the objective worth of the intended quality»⁸².

While in some decisions Judge Pompedda requires the objective importance of the quality, in general, he seems to put more emphasis on the

80. «Aestimatio autem subjectiva nubentis hic est consideranda quae non necessario concordat cum valore vel momento obiectivo qualitatis desideratae. 'Poco importa, da questo punto di vista, che la qualità cui il soggetto dirige directe et principaliter la sua volontà sia o no stimata dalla società in cui egli vive. Ciò che interessa è la sua valutazione soggettiva, poichè l'error qualitatis da *simplex* diviene *redundans* soltanto in quanto la qualità sostituisca nell'animo del nubente l'indivualità fisica' O. FUMAGALLI-CARULLI, in *Il Diritto Ecclesiastico*, 1981, 2, p. 162», c. HUOT, November 24, 1987, n. 33, in «Il Diritto Ecclesiastico» (1988)4, pp. 462-474.

81. After his praise of Canals' decision, the auditor makes some declarations which show that more importance is to be given to the will of the contracting party. «Ast praeterquam quod ab obiectum et universalissimam cognitionem qualitatis personae, quae tangat ipsam personam, attendi debet ad aestimationem subiectivam contrahentis, quae directe et exclusive peculiarem qualitatem alterius contrahentis determinat, quamvis non unicam neque exclusivam in individuatione personae, cuius error in aestimatione talis qualitatis in personam redundat et coniugium dirimit», c. PALESTRO, June 24, 1987, n. 6, in «Il Diritto Ecclesiastico» (1988)2, pp. 3-13. He goes on to cite a text by Ewers, February 10, 1973 which states that one must be highly attentive to the will of the erring party.

82. The ponent textually cites can. 1097, § 2 and thus concludes: «'ita admittens praevalentiam aestimationis subiectivae super obiectivo valore qualitatis intentae' (Cfr. P.A. BONNET, *Introduzione al consenso matrimoniale canonico*, Milano, 1985, p. 71)», c. PALESTRO, June 24, 1987, n. 6, in «Il Diritto Ecclesiastico» (1988)2, pp. 3-13.

subjective aspect. Besides the sentence already cited where this Roman auditor speaks about the truer and more probable definition of *error redundans*, in another decision, he proposes a similar definition of a quality which redounds in the person: when the quality is intended before, or instead of, the other party. The contractant specifically directs his/her will towards a person, who is determined by a specific quality, to such a degree that the contractant desires to marry only in as much as the other party possesses the desired quality or qualities. Therefore, one ought to give importance to the intention of the contractant⁸³.

The decision by Judge Parisella on June 16, 1983, makes a very interesting distinction or observation concerning the juridical figure of an error of quality principally intended. The defendant's lawyer tries to accuse the matrimony on the grounds of an error concerning the torpid behavior of the woman, which, according to the common evaluation of men, affects the very person and thus make this person completely different. Judge Parisella qualifies this assertion as being completely false (*est vehementer erroneum tam in iure, quam in facto*), and he clarifies the concept of *error redundans*: It is not a case of an error of quality which in itself renders the matrimony invalid, but rather of an error of quality which redounds in error of the person. This occurs when the quality is principally intended while the person is intended less principally⁸⁴.

83. «Iamvero, qualitas *redundat* in personam quando ipsa prae persona intenditur, idest quando subiectum contrahens intendit matrimonium inire cum persona *determinata per aliquam qualitatem*, adeo ut non velit connubium inire cum quacumque persona neque cum persona cognita utpote praedita quadam qualitate, sed tantummodo cum persona quatenus et in quantum habente illam vel illas qualitates. Igitur attendi debet ad rationem sub qua contrahens compartem cognoverit necnon ad intentionem qua cum illa contrahere voluerit», c. POMPEDDA, July 28, 1980, n. 6.

84. «...quippe ignoraverit corruptos mulieris conventae mores; atque proinde erraverit circa qualitatem personae non incidentalem seu secundariam, sed redundantem in personam: 'qualitas meretricis est determinativa personae, iuxta communem existimationem'. Huiusmodi autem assertum, quidquid egregius actoris Patronus opinatur, est vehementer erroneum tam in iure, quam in facto. Ad ius quod attinet, praeter ea quae fusiore calamo supra exposuimus, abs re admonere non erit errorem circa qualitatem tunc tantum irritum reddere matrimonium in duplici casu de quibus in § 2 eiusdem canonis 1083; ageretur enim de casu, quo error qualitatis redundaret, id est refunderetur in errorem personae. Quod tantummodo contingere solet, quoties 'directe et principaliter intenditur qualitas et minus principaliter persona' (S. ALPHONSUS)», c. PARISELLA, June 16, 1983, n. 55 *in fine* and n. 56.

2. *A shift of focus from the quality to the consent*

The increasing acceptance of the third Alphonsian rule in Rotal jurisprudence responded to the greater stress and importance given to matrimonial consent and to the object of this consent. *Gaudium et Spes* n. 48 and canons 1055 § 1 and 1057 § 2 now emphasize the fact that this consent is the origin of the matrimonial bond. Through this consent, the spouses mutually receive and give themselves to one another, not only for purposes of the *ius in corpus* but also to establish a *consortium totius vitae*. It is not surprising, therefore, to encounter the center of attention turning towards the will of the contractant. In fact, it is completely logical and coherent with this new focus on the essence of matrimony as defined by Vatican II and received into the new code; that is, matrimonial consent includes much more than the *ius in corpus*, but also encompasses the *consortium totius vitae*. As a result, in the measure that Rotal jurisprudence began accepting a quality principally and directly intended as a valid grounds of nullity (and sounding the arguments and basis for this nullity), it became more apparent that the basis of this juridical figure pointed not so much to the quality isolatedly considered but more so to the very matrimonial consent of one of the spouses. Thus, a clear shift in focus begins to develop: a shift away from the quality and towards the consent or will of the contracting party.

As an example, Judge Pompedda, while still maintaining (at least in theory) the objective importance of the quality according to the common feeling or estimation of today's civil and ecclesiastical societies, stresses the fact that a redounding quality is that which ought to be included among the aims of the will or the object of consent⁸⁵. If this is the case, that the quality becomes part of the object of matrimonial consent, then when the quality is lacking the very consent is vitiated. To support this notion, Pompedda invokes St. Thomas.

The angelic doctor reasons that whatever impedes the cause, by its very nature, must also impede the effect. Since consent is the cause of matrimony, that which invalidates the consent also invalidates the matri-

85. «Reduci iam debet ad *redundantiam* illam definite intellegendam: res igitur componi iterum iterumque debet intra fines voluntatis seu consensus obiectum», c. POMPEDDA, July 23, 1980, n. 6.

mony. Consent is an act of the will which presupposes an act of the intellect. If the first aspect is lacking or deficient, then necessarily the second part is also defective. Therefore, when an error impedes the understanding, it follows that the consent is defective as well, and as a consequence the matrimony too. Thus, error invalidates matrimony by natural law⁸⁶. The reasoning is quite clear and logical, and other auditors began moving in the same direction.

Judge Serrano in 1982, after speaking about the need to consider an error as regards the quality of a person from the perspectives of fraud, error and condition, maintains that these figures should be considered from the aspect of conjugal consent which is an act of the will necessary for the mutual exchange of the persons marrying⁸⁷.

In 1984, Judge Stankiewicz, who seems to have captured the essence of the third Alphonsian rule, maintains that error of a quality principally and directly intended falsifies the mutual self-giving and acceptance of the spouses. In his opinion, Rotal jurisprudence holds that the truer explanation of canon 1083 § 2, n. 1 of the 1917 code, concerning error of a quality redounding in error of the person, is that the quality is intended before the person. This occurs when the consent is brought to bear directly and principally on the quality and indirectly on the person. Then the quality, being an integral part of the contractant (*personam compartis integrans*), invades the object of consent which includes the mutual self-giving and acceptance of the contractant⁸⁸.

86. «Denique tandem succurrit lucidissima Aquinatis doctrina: 'quidquid impedit causam de sui natura, impedit et effectum similiter. Consensus autem est causa matrimonii. Et ideo quod evacuat consensum, evacuat matrimonium. Consensus autem voluntatis est actus, qui praesupponit actum intellectus. Deficiente autem primo, necesse est defectum contingere in secundo. Et ideo, quando error cognitionem impedit, sequitur etiam in ipso consensu defectus. Et per consequens in matrimonio. Et sic error de iure naturali habet quod evacuet matrimonium' (*Supplem.*, 1. 51, art. 1, in c)», c. POMPEDDA, July 23, 1980, n. 6, *in fine*. This same text of St. Thomas is cited by Agustoni in the sentence of July 10, 1984, n. 12.

87. «Et haec omnia, cum plene recognoscantur valida etiam sub sola consideratione consensus coniugalis tamquam actus voluntatis, quo perficitur necessaria illa, de qua dicebatur, mutua ipsarum personarum nubentium commutatio», c. SERRANO, May 28, 1982, n. 17.

88. «Quapropter etiam penes N. Fori prudentiam nunc verior habetur can. 1083, § 2, n. 1 C.I.C. a. 1917 explanatio, iuxta quam error qualitatis in errorem personae redundat, si qualitas prae persona intendatur, quod obvenit quotiescumque consensus fertur directe et principaliter in qualitatem, indirecte autem in personam. Tunc enim qualitas personam

Stankiewicz maintains the same idea in a sentence of December, 1985⁸⁹.

In a decision of June 24, 1987, Judge Palestro maintains the same line of thought. A quality principally and directly intended is contained in the very matrimonial consent. Hence, if the desired quality is lacking, then the consent is deficient as well⁹⁰.

A decision in 1987 by Judge Huot moves in the same direction. The sentence states that, exceptionally, the object of matrimonial consent may include not only the physical person of the partner, but a person necessarily adorned with a definite quality. These qualities, if intended directly and principally, penetrate into -and constitute- the object of consent; thus, an error concerning a quality redounds in the very person⁹¹. Later, the *ponens* is even more explicit in his explanation of the manner in which the desired quality affects the will. His opinion is that the quality substitutes the person. As a result, if one errs concerning this quality, the object of the contract no longer exists. The auditor refers to works by Fumagalli-Carulli and Di Felice in order to support his view. These authors maintain that the prevalent object of the consent is the quality, and that the will or mind of the contractant is directed towards and falls upon the physical person in as much as this person possesses the desired quality⁹².

compartis integrans, in obiectum consensus, in quod cadit contrahentis sui ipsius traditio et alterius acceptatio ingreditur», c. STANKIEWICZ, January 24, 1984, n. 7.

89. «Sane qualitas directe et principaliter intenta, in aestimatione errantis personam compartis identificans, in obiectum consensus, in quod cadit sui ipsius traditio et alterius acceptatio, ingreditur», c. STANKIEWICZ, December 19, 1985, n. 14 *in fine*.

90. «Et hoc explicatur quia contrahens suum consensum directe et principaliter ad qualitates personae dirigit et tantum indirecte et subordinate ad personam, quare in consensu haec qualitas continetur et, deficiente reapse qualitate, deficit consensus», c. PALESTRO, June 24, 1987, n. 6, in «Il Diritto Ecclesiastico» (1988)2, pp. 3-13.

91. «Objectum vero contractus matrimonialis exceptionaliter esse potest non ipsa solummodo persona physica compartis sed persona determinata qualitate (vel determinatis qualitatibus) necessario ornata; quae qualitas autem, si directe et principaliter intenditur, obiectum ingreditur et constituit, error circa qualitatem tunc in ipsam personam redundat», c. HUOT, November 24, 1987, n. 15, in «Il Diritto Ecclesiastico» (1988)4, pp. 462-474.

92. «In mente errantis qualitas substituit personam: si errat, obiectum contractus non amplius existit. Hoc enim verificatur 'cuando il nubente valuta quella qualità come più importante della persona fisica dello stesso consorte e perciò sostituisce il tipo di persona corrispondente a quella qualità astratta alla persona fisica, dirigendo verso questa qualità la sua volontà' (O. FUMAGALLI-CARULLI, in *Il matrimonio canonico dopo il Concilio*, p. 64). Tali in casu, 'il consenso espresso dal contraente ha per oggetto prevalente quella qualità, ritenuta esistente in quella persona e, mancando l'oggetto del consenso, il consenso stesso

Agustoni expresses a similar opinion concerning a qualifying quality which becomes a requirement of the matrimony and penetrates the volitional act. (This is much more than mere simple error.) He makes a comparison with this juridical figure and those of simulation and exclusion of the essential ends of matrimony maintaining that in all of these juridical figures, one is in the area of a defect of consent because the aim of the will is lacking or wrong⁹³.

A recent decision by Judge Faltin simply states that the case of error concerning a quality is a problem of lack of consent⁹⁴.

Now that Roman jurisprudence acknowledged the vitiating strength of an error of quality to reside in the will of the contractant, other discussions arose concerning the type of will necessary to void a matrimony. In other words, to what «degree» must the quality form part of the will? Or, what type of will is necessary to consider that a quality was principally and directly intended? Some Rotal judges took up this question, and their observations are discussed in the following section.

3. *Is a positive act of the will necessary for marital consent to be vitiated?*

Judge Pompedda has used the term *numquam satis* to describe the investigation concerning the defect of consent resulting from a quality principally intended⁹⁵.

non ha valore giuridico' (A. DI FELICE, *La recente giurisprudenza rotale circa l'error qualitatis redundans in errorem personae.*, in *Dilexit iustitiam*, p. 43», c. HUOT, November 24, 1987, n. 33, in «Il Diritto Ecclesiastico» (1988)4, pp. 464-474.

93. «Manet certo solvenda, singulis in casibus, ardua quaestio an intenta sit in facto 'qualitas qualificanda' in personam redundans: verumtamen in iure iam clarum est, quod agi debet de requisito quod consensum ingressum sit, ideoque, simplicem errorem exploserit ...

»Quae illic referuntur praesertim ad exclusionem bonorum essentialium coniugii et ad simulationem consensus spectant, sed congrue congrua relatis, legitime tribui possunt etiam consensui ex errore praestito: in utroque namque casu agitur de consensu qui in proprium obiectum tendit detortum», c. AGUSTONI, July 10, 1984, n. 13.

94. «Probationem vero quod respicit, sicuti in omnibus causis defectus consensus, ita etiam in huiusmodi causis ob errorem qualitatis redundantem in errorem personae...», c. FALTIN, May 26, 1989, n. 11, in «Ius Ecclesiae» 2 (1990), pp. 177-190.

95. Cfr. c. POMPEDDA, July 28, 1980, n. 3.

It seems clear that the Rotal jurisprudence now puts the invalidating force of an error of quality principally and directly intended in the matrimonial consent. The matrimonial will formulated and emitted by one of the contractants contains an element (the quality) which is lacking in the other party; this causes the consent to be vitiated in its root, and therefore the marriage is null and void.

However, the question arises: when does the quality become so linked to the matrimonial consent as to completely vitiate this act of the will, making it null in its very origin? Is it necessary to demonstrate a positive act of the will? Must it be expressed or may it be implicit? Several of the sentences studied address this question.

Judge Faltin, in his decision of 1989, dedicates a fair amount of the *in iure* to this problem. The decision maintains that canon 1097 § 2 includes two possibilities which can be described in the following manner: 1) in as much as a quality is subjectively principally and directly intended in an express manner; 2) a quality which is principally and directly intended objectively by the society and subjectively by the contractant but in an implicit manner⁹⁶. The *ponens* continues explaining this distinction using an argument very similar to one already commented.

Because of the culture and traditions of a given society, certain qualities may be directly and principally intended by the contractant but in an implicit manner. This implicit desire or will has its measure in the «objective» desire or will of the society. In other words, if the society as a whole, because of a general way of thinking, principally and directly «intends» a specific quality in matrimony, it can be presupposed that the individual also intends -directly and principally- this quality. It has already been pointed out that this manner of proceeding is difficult to put into practice in a coherent and consistent manner.

However, what is more interesting here is the mention of an implicit act of the will. The *ponens* maintains that this type of will is sufficient to nullify a marriage supporting this affirmation in a passage originally ap-

96. «Certo certius, in citato canone duo hypotheses incluendae sunt, scilicet: a) quatenus expresse, directe et principaliter *subiective* intendatur; et b) quatenus qualitas directe et principaliter *obiective a societate et a contrahente subiective*, sed Implicite vehementer directe et principaliter intendatur», c. FALTIN, May 26, 1989, n. 9, «Ius Ecclesiae» 2 (1990), pp. 177-190.

pearing in a decision by Sabbatani and later cited by Palestro. Faltin also makes reference to a decision by Pompedda in 1985. The three auditors maintain that an implicit act of the will is sufficient in order to acknowledge an error of a quality which redounds in the person.

The reasoning of Judges Faltin and Palestro, using the words of Sabbatani, is that an implicit act of the will remains in the positive order, and although the substance of this intention is not immediately obvious, it is truly and positively contained in the consent and not merely presumably contained therein⁹⁷.

Given that, in the opinion of some judges, an implicit act of the will has a nullifying effect, Faltin is quick to point out that one should not confuse a quality which is *implicitly* but directly and principally intended with a quality *presumably* directly and principally intended⁹⁸. In any case, Faltin mentions that one should keep in mind the subjective evaluation of the quality by the contractant. Once again, a greater forcefulness is given to the subjective aspect or to the will of the contractant in which the quality of the partner becomes the radical identifying factor. According to Faltin, the lack of consent brought about by this pre-determination and directing of the will towards a certain quality is extremely difficult to distinguish from a moral or psychological incapacity of giving consent to a person who lacks this quality⁹⁹.

As has been mentioned, Judge Palestro also supports the idea that an error of quality principally intended can be acknowledged with an implicit

97. «Ratio est, quia 'actus implicitus remanet in ordine positivo, quatenus quamvis eius substantia non appareat directe et immediate in manifestatione consensus agentis, tamen ibidem *identidem continetur realiter et non praesumptive, positive et non interpretative*' (cf. R.R. Dec., in uno Caracen., diei 24 iunii a. 1987, c. PALESTRO, n. 6; in una Neapolitana, diei 22 iulii a. 1985, c. POMPEDDA, n. 15)», c. FALTIN, May 26, 1989, n. 9 *in fine*, in «Ius Ecclesiae» 2 (1990), pp. 177-190.

This same text is cited by Doran in his decree which confirms Judge Faltin's sentence. Cfr. decree c. DORAN, November 9, 1989, n. 9 *in fine*, in «Monitor Ecclesiasticus» 116 (1991), pp. 379-389.

98. Cfr. c. FALTIN, May 26, 1989, n. 10, in «Ius Ecclesiae» 2 (1990), pp. 177-190.

99. «Utrumque et in omni casu attendi debet ad aestimationem subiectivam contractantis, in quo qualitas compartis identificans personam tam radicatum adesse et veluti incarnatam adeo ut defectus consensus difficilime distingui possit ab incapacitate morali seu psychologica aliter cogitandi,...», c. FALTIN, May 26, 1989, n. 10, in «Ius Ecclesiae» 2 (1990), pp. 177-190. It does not seem that the judge is using «incapacity» with all of its juridical connotations as it is used in canon 1095.

act of the will. Besides the text already cited, he bases his argument on an instruction from 1877 which declares that an indirect and implicit intention is sufficient to prove a lack of marital consent¹⁰⁰. Palestro continues his reasoning citing a text from a decision by Pompedda where he claims that a quality directly and principally intended can be included in a general and implicit act of the will. Therefore a positive act of the will is not necessary¹⁰¹.

Although Judge Pompedda seems to be generally pleased with the new canon 1097, he does offer some criticism in his decision of 1985. One of the aspects which he comments concerns the necessity of a positive act of the will. In the opinion of this Roman auditor, one can deduce from canon 1101 § 2, in the contrary sense, that a positive act of the will is not needed to consider a quality as principally and directly desired by the contractant¹⁰². The reasoning seems to be that if a positive act of the will is needed to exclude an essential part of the matrimonial alliance, then everything else which might pertain to the will can be considered as falling beneath the influence of an implicit or general intention. In other

100. «*Ut qualitas directe et principaliter intendatur non requiritur actus explicitus cum sufficiat actus implicitus, quod confirmatu etiam ex argumento contrario cum S.C.S. Officii in Instructione ad Episcopum nesuquilien d. 24 januarii 1877 declaraverit sufficere intentionem indirectam et implicitam ad comprobendam pravam voluntatem non consentiendi in vinculum perpetuum (cfr. Fontes C.J.C., vol. IV, n. 1050, p. 373)*», c. PALESTRO. June 24, 1987, n. 6, in «*Il Diritto Ecclesiastico*» (1988) 2, pp. 3-13.

101. «*In praecitata sententia diei 22 iulii a. 1985 c. Pompedda, Pon. affirmatur 'quamvis id violentiam in sensum canonis interpretandum (agitur de can. 1097, § 2) aliquando sapiat, illa directa et principalis intentio in qualitatem, circa quam nubentes errant, generali et implicita ratione intelligi posse, atque ideo non positiva voluntate'*», c. PALESTRO. June 24, 1987, n. 6, in «*Il Diritto Ecclesiastico*» (1988) 2, pp. 3-13.

Pompedda concedes that this interpretation seems to «stretch» the canon a bit.

It would seem there is a bit of contradiction here. Previously, Judge Palestro cited a passage which maintains that an implicit act of the will or intention remains in the positive order, while here, Judge Pompedda's assertion seems to consider an implicit intention as being opposed to a positive intention.

102. «*Res utique plerumque erit quaestio facti, sed potior atque doctrinalis quaestio erit de mera significatione subiectiva an potius de ratione obiectiva agnoscenda illi intentioni directae et principali. Priorem interpretationem nimis festinanter atque fortasse nimia levitate accepisse videntur quidam Auctores de novo Codice disserentes. Intentio sane, cum sit voluntatis directio, quid subiectivum formaliter dicit, haud tamen requirit positivum et explicitum actum: quod confirmatur, ex argumento contrario, ex eo quo nisi adsit positivus actus exclusionis (can. 1101 § 2) ad valide contrahendum matrimonium, idest ad obligationes suscipiendas sufficit generalis intentio contrahendi*», c. POMPEDDA, July 22, 1985, n. 15.

words, according to this line of thought, a positive act of the will is needed to *exclude* an essential part of matrimony, but an implicit act of the will is sufficient to *include* a non-essential aspect in the matrimonial consent.

Lastly, simply to mention a sentence of 1973 by Judge Ewers, the auditor described the will of the contractant as not only principally aimed at the quality but also directly and exclusively directed towards this quality¹⁰³. The *ponens* immediately afterwards quotes the words of Judge Bejan concerning a quality which is substantially intended and not merely accidentally. What is noteworthy here is the use of the adverb «exclusively» to describe the matrimonial will's tendency towards the quality¹⁰⁴.

4. *Observations concerning the act of the will in a quality directly and principally intended*

The previous section presents the opinions of various Rotal judges who maintain that an implicit will is sufficient to consider a quality as being principally and directly intended. Judge Pompedda seems to have been the first to speak about the nullifying capacity of an implicit will; later Palestro took up the same idea, and finally Faltin reiterates this theory. Faltin, though, would seem to be stricter in his understanding of an implicit will since he speaks about a moral or psychological impossibility of contracting with a person who does not have the greatly desired quality. Pompedda admits that this interpretation smacks of doing violence to the meaning of the canon. His observation is well taken, and therefore some comment should be made concerning this issue.

First, it would seem that the decision or discernment concerning whether or not a quality is implicitly desired reverts back to an old problem: more often than not, this implicit desire has its roots in the social or traditional customs of the place where the matrimony is celebrated. Once

103. *Cfr.* c. EWERS, February 10, 1973, n. 3.

104. It would seem the use of «exclusively» is rather strong since this would imply the exclusion of all the other properties and elements of matrimony, in which case, there would be no matrimonial consent. The fact that the auditor later quotes Bejan would seem to indicate that he is in favor of, or at least agrees with, the idea that the will be substantially directed towards the quality and not exclusively.

again, judges would be faced with the difficult task of deciding or «making a list» of those qualities which every person in this particular society implicitly but directly and principally desire in their partner. Both Pompedda and Palestro base this implicit desire on these apparently objective social factors¹⁰⁵. It has already been seen that this is not easily accomplished. There would always be qualities which are greatly desired but cannot be considered as always directly but implicitly intended. In addition, the contractant's volitional act could be contrary to what is generally esteemed by society. This would lead to many grey areas, uncertain qualities, which would open the way for many fissures in the matrimonial bond.

Even if one concedes that certain qualities are always implicitly but directly intended, other problems arise. For instance, if it were acknowledged that every person in a given society implicitly but directly and principally desired a certain quality in the other (for example, an academic title or a certain nationality), lacking this quality would become a type of implicit impediment. That is, persons who do not enjoy these qualities would be impeded in contracting matrimony if they did not make this fact known to the other partner; and moreover, the marriage would be null even if the other contractant did not, in fact, directly and principally desire this lacking quality. Granted, the Church does have the power to enact such laws, but it would seem very risky attempting to define exactly what qualities of the person should be included. It would be virtually impossible to make a universal law which could be applied in the whole world¹⁰⁶.

105. Pompedda, immediately after stating that a positive act of the will is not necessary, supports his position precisely in these social or cultural factors. «Ita quosdam apud populos, uti fori usus nos docuit, haud intelligitur ex parte viri puella nubilis idest matrimonio apta quae non sit virgo, aut quae ad generandum non sit capax; item apud quasdam familias vel in quibusdam coetibus nulla mulier in matrimonium traditur nisi cum viro certis qualitatibus sive nobilitatis sive census sive socialibus praedito. Numquid ibidem agnosci debet, si error exstet circa qualitates easdem, consensus nullus?», c. POMPEDDA, July 22, 1985, n. 15.

106. Of course, this does not go against what the Church has legislated concerning other qualities (such as age, public honesty or disparity of cults). Since these qualities directly affect the essence of matrimony or relate to the substance of the matrimonial bond, the legislator considers them impediments to a valid marriage. One could argue, therefore, that in the same way, the legislator could raise socially important aspects or greatly desired qualities to the category of an impediment, at least implicitly. Perhaps. But although the

Thus, the very basis for determining which qualities are implicitly desired by all persons seems to be a bit risky. One is thrust once again into the area of criteria which are decided by a group of people, and then applied to individuals in contracting a particular matrimony. Moreover, these qualities are not essential in themselves to matrimony. Giving them an implicit nullifying force, then, would be to raise non essential elements to the level of implicit impediments, and thus bring with it a corresponding restriction in the *ius connubii*.

Palestro and Pompedda both give other reasons for accepting their opinion. Palestro based himself on an old instruction which maintained that an implicit and indirect intention is sufficient to prove a lack of will in consenting to a perpetual bond.

Pompedda, to prove his manner of thinking, invokes precisely canon 1101 § 2. He seems to conclude that since a positive act of the will is necessary in order to exclude an essential element of matrimony or an essential property of the same, then an implicit act of the will is sufficient to include other non-essential properties or non-substantial qualities concerning the person. However, it seems this argument could be turned around. In other words, if a positive act of the will is necessary to exclude an essential part of matrimony, then a positive act of the will is also necessary to raise a non-essential quality to the level of an indispensable requirement of the matrimonial alliance¹⁰⁷.

With this way of thinking, one takes for granted as included in a matrimonial will or consent only those aspects which are essential to the

decision to do this may be correct (most of the time or in most cases), the reasons are wrong. While all the other impediments are derived from looking at the essence of the matrimonial alliance, and afterwards throwing out all those aspects which directly or indirectly go against this bond, these «implicit impediments» begin by looking at what the society thinks and then applying these criteria to matrimony. The logic is backwards and could easily lead to a degeneration of the true definition of matrimony.

107. One might argue that subjectively including as essential an objectively (from the point of view of natural law) non-essential quality is not true matrimonial consent. Here one is faced with two possibilities. 1) Disallow altogether this possibility of including non-essential elements as part of the matrimonial consent by not acknowledging these qualities directly intended and considering the consent valid. This is the position of classical canonical doctrine. 2) Consider such consent as not being true matrimonial consent, and therefore, null by definition.

This work proposes that both of these arguments are rejected by the legislator's acceptance of canon 1097 § 2.

matrimonial alliance. Any other non-essential quality or aspect would have to be included by a positive act of the will and not by a mere implicit act. It would seem that if one is to assume that a matrimonial will is valid and contains all the «essentials» unless there is a direct act of exclusion of one of these elements, then it is logical that one assumes no «extras» to be added to this consent unless it too is done by a positive act of the will.

St. Alphonsus' example, when describing his third rule, seems also to push in this direction. The statement «I wish to marry a noblewoman», directly expresses an act of the will concerning a quality. St. Thomas, in his example, speaks of someone who «directly intends to consent in marriage to the son of a king». Again, it would seem here that a positive and deliberate act of the will is warranted. The problem which one encounters in studying real-life causes is that the majority of the contractants do not openly express this desire or intention. Thus, some auditors looked to an implicit act of the will as a solution. Besides the fact that the foundation of the implicit act is insecure, the very definition of an implicit act of the will does not really indicate to what degree this implicit act directly affects or invades the marital consent.

Taking all these things into account, this study proposes a distinct point of view of the problem as presented in other recent Rotal jurisprudence: the point of view of the consent, and concretely, the essential elements or objects of this consent. Therefore, if a certain quality is raised to an essential element of the consent, and this quality is lacking, the consent is invalid. The main point here is that the quality becomes an essential component of the matrimonial will (and not merely an integral part) such that the consent does not exist without this quality.

This manner of presenting the problem avoids the discussion of an implicit act of the will. What is important to judge is if there was another aspect added to the basic content of the matrimonial alliance and if this aspect was considered essential to the matrimony by the contractant. In the example of St. Alphonsus, nobility becomes an essential aspect of matrimony. The person may or may not expressly think or will: «I want to marry a nobleperson», but other words or deeds will demonstrate that the contractant considered nobility an essential requirement in his/her matrimony. Judge Agustoni puts it very well and succinctly when he states that a quality directly and principally intended binds the validity of the con-

tract, for it becomes part of the very substance of the consent¹⁰⁸. Judge Huot states that the quality invades the substance of the contract to the point that if the quality is lacking then the object of consent is absent as well, and therefore, the consent is deficient¹⁰⁹.

Conceiving an error of a quality principally and directly intended in this manner puts all the nullifying power in the will of the contracting party¹¹⁰. The advantages of this solution could be summarized as follows: 1) It reinforces, once again, the fundamental importance of the will as the origin and source of the matrimonial bond; 2) it also reinforces the classical doctrine that an accidental quality in itself, as important as it may seem to some, does not enjoy nullifying strength against the matrimonial bond; 3) at the same time, it avoids the problems and dangers of an incoherent and chaotic matrimonial system based on the values of a given society and traditions of certain cultures; 4) it helps maintain the objective reality and perspective of natural law when dealing with matrimonial impediments.

E. *Proving a quality principally and directly intended*

This section deals with an interesting aspect of the present study since it descends to real life situations and presents the arguments and evidence which Rotal judges used in acknowledging nullity on the grounds of a quality principally and directly intended. Studying the *in facto* part of the Rotal decisions will help to better understand this juridical figure in its diverse aspects and also its manner of application to particular marriages. Of course, especially useful and interesting are those causes which actually granted the nullity on the grounds of an error of quality principally and di-

108. «... qualitatem directe et praevalenter intendit ipsi nectit validitatem contractus, quia illa haeret substantiae consensus», c. AGUSTONI, July 10, 1984, n. 14.

109. «Qualitas ipsam contractus substantiam ingrediuntur atque constituunt ac proinde, deficientibus illis, deficit objectum contractus; deficiente autem objecto, deficit et ipse consensus», c. HUOT, November 24, 1987, n. 46, in «Il Diritto Ecclesiastico» (1988) 4, pp. 462-474.

110. In his commentary to canon 1097, Viladrich describes the error as forming «un todo único con su consentimiento, esto es, pasa al consentimiento por un acto de voluntad no interpretativa, sino actual». P.J. VILADRICH, *Comentarios al Código de Derecho Canónico*, Pamplona 1987, p. 660.

rectly intended, although sentences which decided in favor of the bond will be studied as well.

Since the Alphonsian interpretation of a quality principally and directly intended moves in the area of consent, it is obvious that the most common form of evidence will be indirect. In other words, judges will have to more closely consider the contractant's behaviour and reactions upon discovering the error than his/her testimony¹¹¹.

1. *Sentences which did not grant the nullity*

Proving that a quality was not directly or prevalently intended is usually an easier task than proving the contrary. For instance, in the decision c. Pinto of November 12, 1973, although the *ponens* follows the Sanchonian interpretation, he does accept the third rule of St. Alphonsus as an implicit condition. Therefore, in the *in facto* part of the cause, he argues that there is no evidence which supports the claim that the plaintiff desired a certain quality in his spouse. The quality discussed here is lack of fecundity, and the plaintiff himself holds that sterility does not render the matrimony null. It is also noted that the plaintiff continued living peacefully with his spouse for 19 years after discovering her sterility. This strongly suggests the man could not have greatly or principally desired this quality¹¹².

In another decision by Pompedda on July 23, 1980, a man married a woman (already pregnant) and accuses his marriage on the grounds of error concerning her honesty and virginity. The verdict given was in favor of the bond because 1) Venceslaus, the plaintiff, knew his wife was pregnant when they began matrimonial life, and 2) the cause of the separation came about because Venceslaus' mother and sister pressured him to separate; it was not really his decision¹¹³. Again, the behaviour and actions of the plaintiff are used as indicators to acknowledge or not the presence of an error of quality prevalently intended.

111. Cfr. c. FALTIN, May 26, 1989, n. 11 (entire), in «Ius Ecclesiae» 2 (1990), pp. 177-190.

112. Cfr. c. PINTO, November 12, 1973, n. 13.

113. Cfr. c. POMPEDDA, July 23, 1980, nn. 9-11.



In a decision handed down by Judge Parisella on June 16, 1983, the actor claimed he suffered an error concerning the good moral customs of his wife. However, the actions of the plaintiff undermine this argument as the parish Pastor testifies that the husband was the more anxious about the reconciliation of his marriage. The sentence frankly states that the cause of the separation was the tension between the wife and the older children¹¹⁴.

When the previous sentence was appealed, Judge Jarawan also decided in favor of the bond. This Rotal auditor again looks to the behavior and the words of the husband. The plaintiff openly states that he married Livia, the respondent, because she was a laborious and affectionate woman. In addition, after the separation, the woman declares that the plaintiff would visit her practically everyday asking her to return to his home¹¹⁵.

Another sentence by Judge Stankiewicz employs the same method: the actions of the plaintiff deny that he really principally and directly intended a certain quality in his wife. The cause deals with a man who married an epileptic woman. Even though the plaintiff accused the marriage because of error concerning the health of his spouse, the acts demonstrate that it was very unlikely the plaintiff knew nothing about the epilepsy. In any case, the marriage continued from 1972 to 1979, during which time the wife's condition was evident. The husband even admits that he was hoping his wife would get better and that he gave her all the help he could¹¹⁶. It seems clear that the husband never considered ending marital life because of his wife's sickness. On the contrary, his first reaction is one of help and hope for improvement.

Judge Stankiewicz, in a decision of December 19, 1985, also recurs to the behavior of the plaintiff before the matrimony and after the error is discovered. Based on these events, Stankiewicz overturns a previous Rotal decision which granted the nullity on the grounds of error¹¹⁷. The cause deals with a woman who became enamored with a man because of his religious spirit and sacrifice in living the Gospel, especially with re-

114. *Cfr. c. PARISELLA*, June 16, 1983, nn. 58 and 59 *in fine*.

115. *Cfr. c. JARAWAN*, December 18, 1984, n. 4 and n. 5 *in fine*.

116. *Cfr. c. STANKIEWICZ*, January 24, 1984, nn. 2, 13.

117. Stankiewicz rejects the grounds of error, but does grant the nullity under a different chapter (the incapacity of the respondent to assume the obligations of matrimony).

gard to helping the poor. After the matrimony, the husband completely changes, giving himself over to a materialistic life-style, and eventually, he was taken away by the police because of unpaid debts.

Citing a passage from the appealed sentence, Stankiewicz esteems that Mary, the plaintiff, did not seem to have a pre-conceived notion of the man she wanted to marry; it appears that she fell in love with Titus because of his spiritual qualities, but not that she specifically and directly desired them before the matrimony¹¹⁸.

Moreover, the judge points out that the woman did not err concerning the respondent's qualities at the time of the marriage, but rather there was a radical change in his character. According to this *turnus*, Titus had genuine desires of serving the poor but his lack of expertise and a naïve character seemed to have led to his ruin¹¹⁹. Here, Stankiewicz makes an interesting distinction: the difference between an error of the person and a *change* in the character of the person¹²⁰; this difference is especially important when dealing with moral qualities.

In addition, Stankiewicz indicates that married life lasted for five years, during which the plaintiff had plenty of time to discover her error¹²¹. It should also be remembered that Mary asked for an annulment only after Titus was condemned in Civil court in order to recuperate her liberty in front of the Church¹²². Thus the sentence, based on these ac-

118. «Attamen intentio actricis nubendi viro complexu qualitatum humanarum et religiosarum ornato, quas igitur directe et principaliter intendere debuisset, ex testibus nullum ducit argumentum.

»Hoc enim clare admittit appellata sententia quod scilicet: 'summa qualitatum ab actrice in convento desideratarum et suppositarum minus constare poterit ex testibus', c. STANKIEWICZ, December 19, 1985, n. 19.

119. «Intentio Titi ad ducendam societatem 'di imbianchini' in bonum indigentium, pauperum et sic denique revera recta erat, sed malitia aliorum nec non ipsius conventi imperitia vel prorsus incapacitas ad similia negotia gerenda una cum nimia credulitate in ceteros, ipsum ad ruinam seu decoctionem perduxit», c. STANKIEWICZ, December 19, 1985, n. 19.

120. «Nullus igitur error in actrice de qualitate personae viri conventi tempore nuptiarum oriri poterat, etiamsi ob mutationem animi humani et propter circumstantias nuptias subsequentes conventus se immutaverit, quin tamen hoc intenderit ante matrimonium partium», c. STANKIEWICZ, December 19, 1985, n. 19.

121. «Ceterum serio admitti nequit affirmatio de perduratione erroris in actrice per quinque annos vitae coniugalis, tamquam si mulier a viro derelicta percipere potuisset 'di aver sbagliato persona', c. STANKIEWICZ, December 19, 1985, n. 19.

122. Cfr. c. STANKIEWICZ, December 19, 1989, nn. 2-3.

tions of the plaintiff, does not grant the nullity on the grounds of an error of quality redounding in the person.

Other decisions which do not grant the nullity because of error include the following: c. Pompedda, July 22, 1985; c. De Lanversin, March 20, 1985; and a decree of Masala on March 25, 1986¹²³. Like all the previous sentences cited, they base much of their evidence on the plaintiff's actions upon discovering the error concerning the allegedly desired quality. Others prove, at the same time, that the plaintiff never fell into error. However, the common characteristic in all of these sentences is the lack of evidence *before* the marriage to support the plaintiff in his/her claim that the quality was principally and directly intended. That is, there is no proof of the will being predetermined as regards a particular quality.

2. Sentences which did grant the nullity

Judge Pompedda handed down a decision on July 28, 1980 which acknowledged the nullity of a matrimony for an error of a quality directly and principally intended. The sentence points out that the matrimony took place immediately after Victor, the husband, declared that he had a specific university degree as well as a good and well-paying job¹²⁴. The witnesses also confirm that Patricia, the plaintiff, held these qualities in highest esteem and that she was willing to marry only a man endowed with these desired qualities¹²⁵.

That Patricia had a clear preconceived notion concerning the qualities of her future husband, and in fact greatly desired these traits, is clear from her reaction and behavior upon discovering that her husband did not enjoy these qualities. The plaintiff considered her marriage null precisely after having found out that her husband lied about his work and the scholastic degrees. It is worth noting that matrimony life lasted three years, and

123. This decree appears in «Ius Canonicum» 28 (1988), pp. 637-639.

124. Cfr. c. POMPEDDA, July 28, 1980, n. 16.

125. «Testes una voce confirmant nedum aestimationem maximam illorum qualitatem conventi ex parte mulieris, sed insuper istius consilium praenuptiale nubendi tantummodo viro iisdem qualitatibus praedito...

»Anuntiata, actricis affinis deponit: 'Patrizia mi riferì a suo tempo di esseri innamorata di Vitorio perchè di ottime qualità', c. POMPEDDA, July 28, 1980, nn. 16 and 17.

Patricia considered her matrimony null only after discovering the truth about her husband. The sentence uses this reaction as evidence of the high esteem and great importance which Patricia gave to these qualities. The husband describes Patricia's reaction as «*scioccante*» and he himself confesses that his wife's aspiration had always been to marry a man socially well-situated. The husband continues saying that having learned the truth, she went to the priest asking for the annulment of her matrimony¹²⁶. Other witnesses confirm that Patricia regarded her matrimony null at the moment she learned about the true situation of her husband¹²⁷.

In this decision of 1980, Pompedda advocated the double requirement for *error redundans*. Therefore, he also demonstrates that the qualities about which Patricia erred are aspects which affect the very substance of the person, and therefore void matrimonial consent. The argument or evidence concerning the importance of the qualities, as has been mentioned earlier, lacks force. It seems a matter of simply claiming the quality's importance¹²⁸. Moreover, this argument would seem to be superfluous since the nullifying power of a quality principally and directly intended arises from a lack of consent, not because the person is different¹²⁹.

126. «Quantum momentum habuerint in animo et aestimatione actricis qualitates conventi, veluti laurea doctoralis, officium inceptum et curriculum emetiendum, prae ceteris ipse vir etsi nolens demonstravit ubi rettulit: 'Quando mia moglie venne a conoscenza di questi fatti, la sua prima reazione fue scioccante... dopo lo choc iniziale, l'azione di mia moglie è stata più cosciente, perchè si rese veramente conto della gravità della situazione che si era creata, a causa del mio comportamento precedente... quella situazione costituiva il crollo di quello che, evidentemente, era stato sempre la sua aspirazione e cioè di aver un marito socialmente molto elevato... Faccio notare che Patrizia, al momento della mia reale situazione, aveva detto a D. Ottavio, me presente, che avrebbe chiesto l'annullamento del matrimonio'», c. POMPEDDA, July 28, 1980, n. 12.

127. Cfr. c. POMPEDDA, July 28, 1980, nn. 12 and 17.

128. «...certo certius qualitates et conditiones personales viri conventi iam obiective maximi ponderis sunt faciendae, eo potissimum si spectentur conexae et influxum substantialem exercentes in vitam coniugalem. Neque quispiam ambigere valet titulum academicum, munus exercitum, curriculum officii, denique capacitatem suo aere providendi sibimet atque condendae familiae constituere in communi hominum aestimatione huius potissimum temporis qualitates personales seu rem maximi ponderis, adeo ut deficientibus illis potissimum si cunctae simul persona alia habeatur penes hominum societatem pariter ac penes singulos homines», c. POMPEDDA, July 28, 1980, n. 14.

129. If the jurisprudence were to accept and use this concept of objectively important qualities, it would now be processed under canon 1097 § 1 (error of the person) and not under 1097 § 2. Fumagalli would seem to agree with this. Cfr. O. FUMAGALLI, *Persona e società nel*

In a cause which arrived to the hands of Judge Stankiewicz, the *po-nens* declared a matrimony null because of an error concerning the woman's fertility. The sentence spends a fair amount of time speaking about the customs of the people emphasizing the special regard and high esteem which large families enjoy in that particular culture. This importance becomes even more striking when one considers, as is mentioned in the sentence, that the African Episcopal Conference suggested that the Church consider sterility a diriment impediment in this region. The reasons given by the Episcopal Conference for this request center around the strong social and cultural customs of the people. They see matrimony not so much as a contract between two individuals but as an alliance or bond between two families (and the entire family). In addition, the husband and wife are not really considered as such until the day of their firstborn¹³⁰.

It is obvious that fertility is an important characteristic for this society. However, the sentence does not consider this as sufficient to prove the quality was principally and directly intended, but rather, it judges the actions, behavior and deportment of the plaintiff upon discovering the error. Of course, beliefs of his culture will form a part (and even a big part) of his desires for matrimony, but the concrete case must be judged on its own merits taking into account the persons involved. This is exactly what the sentence does.

After speaking about the importance of fertility for this particular culture, the sentence presents a testimony of the man to prove his marital intention was bound to the possibility of having children¹³¹.

The decision also investigates the plaintiff's actions in order to prove that he really principally and directly intended to marry a woman who

matrimonio canonico con particolare riferimento all'error facti, in «Il Diritto Ecclesiastico» (1981) 2, pp. 184-185.

130. Cfr. c. STANKIEWICZ, February 24, 1983, n. 8. These were the recommendations and conclusions from the 1981 meeting of the African and Madagascar Episcopal Conference. Stankiewicz's source is F.J. URRITA, *Pastoralis matrimonialis et familiaris in Africa VI Congressus Generalis SECAM* in «Periodica de re morali canonica liturgica» 71 (1982), p. 259.

131. «Moi, je voulais -ait- une personne avec qui partager la vie dans l'amour sans hypocrisie. Je voulais une personne avec qui j'aurais des enfants, avec qui je partagerais la noble tâche d'éducation des enfants pour leur donner une meilleure éducation chrétienne et civique», c. STANKIEWICZ, February 15, 1980, n. 9 *in fine*.

could bear children. The man, having consummated the matrimony, became aware of the operation which his wife underwent. Immediately he asks her about the operation and if it might be a cause of sterility. He considered this an essential aspect for the validity of his marriage¹³².

Afterwards the plaintiff demanded that his wife take a medical test in order to prove her fitness to have children, but she refused¹³³. He then obtains a civil separation, convinced of having been defrauded by his wife¹³⁴. It is clear that the actions and behavior of the man readily demonstrate his error concerning a quality which he prevalently and directly intended. The fact that fecundity is held in high esteem in his culture is strong evidence that the plaintiff might have really desired this quality, but the evidence must prove that *this* man, in *this* particular matrimony, really desired this *specific* quality.

Judge Agustoni, on July 10, 1984, declared a matrimony null because of an error concerning an hereditary mental illness in the respondent. The decision points out the actions of Joseph, the plaintiff, before the matrimony. Concretely, he twice decided against marrying because his prospective future wife seemed not to enjoy perfect mental health¹³⁵.

132. «... 'devait être pour toi une cause de stérilité, alors nous voulons engendrer?'; et tunc haec verba adiecit: 'et si nous en arrivons chez le médecin et qu'il trouve que ça ne va pas bien, nous n'aurons pas été mariés (validement)'...

»Haec autem verba luculenter probant actorem voluisse valorem sui matrimonii pendere ab existentia qualitatis mulieris capacitatem ad procreationem respicientis», c. STANKIEWICZ, February 24, 1983, n. 12.

133. «Quin etiam actor firmiter expostulabat a muliere ut examen radiographicum subiret ad probandam suam aptitudinem ad prolis generationem, sed frustra: 'Elle y est allée et a vu le docteur S., mais elle n'a pas terminé les examens, puisqu'elle n'est pas passée à la radiographie'», c. STANKIEWICZ, February 24, 1983, n. 12.

134. «Tandem actor pro persuaso habens se fuisse in errorem inductum a parte conventa circa eius fecunditatem, sive separationem instituit, sive ad obtinendum civile divortium recurrit ut agnosceretur 'qu'il n'y a pas eu de vrai mariage'.

»Id autem fecit, ut ait, 'pour qu'on voie clairement de quel côté se trouve la vérité'», c. STANKIEWICZ, February 24, 1983, n. 12.

135. «Bis etenim Ioannes Maria nuptiis ineundis cum optimis mulieribus restitit, qua qualitate, idest integra salute, plurimi aestimata, carebant. Idque habendum est ampla demonstratio quod actor matrimonio ipso perfectam valetudinem compartis praefererat, non voluntate quadam generali, sed actuali», c. AGUSTONI, July 10, 1984, n. 17. *Cfr.* as well n. 7 and n. 1.

After meeting Helen and considering marriage, Joseph wrote letters to Helen's father specifically asking about the psychological health of his future spouse¹³⁶.

When Helen's illness becomes apparent, and the plaintiff is certain of its hereditary origin, he immediately requests the nullity¹³⁷. The sentence also points out why the actor delayed his accusation of the matrimony (They were married in 1955, and Joseph asked for the nullity in 1967). First, he was not sure about the true origin of Helen's sickness because both her father and mother obfuscated the truth; second, he had been away a long time for military service; and third, he did not know that this chapter of nullity existed¹³⁸.

As is clearly evident, the behavior of the plaintiff before the wedding was extremely important to prove an error of quality directly and principally intended; and even more important was the reaction of the plaintiff after discovering that the respondent lacked the greatly desired quality.

Judge Huot, on November 24, 1987, decided in favor of the nullity because of error as regards a moral quality; he, like the previous auditor, bases his decision on the actions of the plaintiff before the wedding and after discovering the error.

Citing Irma's (the plaintiff) words, the judge shows she greatly desired a traditional family with many children; Irma had previously rejected other young men because they did not share these same ideals¹³⁹. The

136. «'La vérité entière: elle seule peut me permettre de faire cesser une indétermination dont je sais le mal qu'elle fait à Eliane'. Nisi perfecta sanitate fruebatur, Ioannes Maria dilectissimam Helianam deserere decreverat, sicut iam ante acciderat pro aliis mulieribus», c. AGUSTONI, July 10, 1984, n. 17.

137. Cfr. c. AGUSTONI, July 10, 1984, n. 1.

138. «Ratio dein agendi actoris apprime congruit cum suis adsumptis. Causam enim serius promovit quia ignorabat validum motivum: 'Si j'ai tant attendu, c'est que je n'ai eu connaissance de cette cause qu'en août 1966' ... e mente praeterea ne excidat quod nefastus influxus matris Helianae, quae pariter ac filia psychicis afficiebatur perturbationibus fucum fecit veritati, ita ut difficulter natura vera infirmitatis conventae dignosceretur», c. AGUSTONI, July 10, 1984, n. 17. Cfr. as well n. 1 and n. 9.

139. «Suam ante nuptialem intentionem aperte exponit actrix: 'Questo mio progetto, che per me era essenziale ed irrinunciabile, ha sempre occupato la mia attenzione e costituiva il vertice delle mie aspirazioni'... Plures exinde jam respuerat juvenes, qui talibus essentialibus qualitatibus non gaudebant», c. HUOT, November 24, 1987, n. 37 *in fine*, in «Il Diritto Ecclesiastico» (1988)4, pp. 462-474.

judge considers this as a strong indicator that Irma really directly desired these qualities as part of her matrimonial will¹⁴⁰.

Earlier in the sentence, the *ponens* reasoned: «if one first and foremost wants to create a Christian family with children, and *one chooses a man apt for this purpose*, then the contractant does not principally and directly intend *this* man, but rather a man *adorned with these qualities*. The intention therefore is primarily and principally brought to bear on a Christian family as an end and on an *adequate man* as a means to this end, or better yet, on the qualities necessary to obtain this end»¹⁴¹.

Upon marrying, however, Irma discovers that Robert, the respondent, did not possess these qualities in the least bit. Moreover, he was given over to a dissolute life and depraved customs. In addition, he showed himself unwilling to have children¹⁴².

Thus the auditor, basing himself on the testimony and actions of the plaintiff, acknowledged an error of quality principally and directly intended which affected the very substance or object of the matrimonial contract¹⁴³.

Judge Falin's decision was already discussed in the previous chapter concerning an implicitly, but directly and principally intended quality. As was seen, the *ponens* of this sentence maintains that the beliefs of society or culture can play such an important part in the marriage contract that a quality may be considered as always being implicitly but directly

140. «Si jam alii viri, propter desideratarum qualitatum absentiam, repulsi antea fuerunt, hoc manifestat maximum momentum seu pondus qualitatum in mente puellae, quae principaliter vult qualitates in viro ad finem prosequendum: normalem ergo intimitatem sexualem», c. HUOT, November 24, 1987, n. 33 in «Il Diritto Ecclesiastico» (1984)4, pp. 462-474.

141. «Si quis autem primo et principaliter vult creationem familiae christianae cum prole et *virum ad hoc aptum elegit*, non *hunc* virum directe et principaliter sed *virum his qualitatibus ditatum* intendit. Intentio primo et principaliter fertur in familiam christianam tanquam finem et in *virum aptum* tanquam medium ad finem vel potius in qualitates ad hunc finem obtinendum necessarias», c. HUOT, November 24, 1987, n. 33, in «Il Diritto Ecclesiastico» (1988)4, pp. 462-474. Cfr. as well n. 39.

142. Cfr. c. HUOT, November 24, 1987, n. 41 in «Il Diritto Ecclesiastico» (1988) 4, pp. 412-474.

143. It may be argued that the proof concerning the plaintiff's intention of the qualities desired, although clear for the *turnus*, does not have the same force as in other sentences studied. This is probably due to the nature of the qualities desired (generation of children and a normal matrimonial life) which in themselves affect the essence of matrimony.

intended. In this sentence, the aspect concerns virginity. The *ponens* proves virginity is a greatly desired trait in the society from statements such as: «the girl ought to be a virgin» or «according to our culture, the good character of the girl is proved by her virginity»¹⁴⁴.

Despite this importance which the society or culture may attribute to virginity, the majority of the proof of a quality principally and directly intended is manifested by the plaintiff's actions and by looking at the concrete facts of the cause¹⁴⁵. The plaintiff himself testifies that virginity was fundamental for him, to such a point that he would not be disposed to take her as his wife¹⁴⁶, and his actions clearly demonstrate this attitude.

Things went bad from the very first night of the honeymoon when the man discovered his wife was not a virgin. A very turbulent matrimonial life ensued which lasted only six months, after which time the spouses separated. At the insistence of the plaintiff's family, he and his partner reunited. However, the plaintiff, being so obsessed that his partner lacked the desired quality, badgered her to the point that she tried to commit suicide. They broke again after one month¹⁴⁷.

The respondent herself admits that the man was completely disconcerted and upset after the first night, and that the following day he alerted his spouse's sister and his own family to ask about her honesty¹⁴⁸.

As is plainly evident, Faltin puts a good deal of emphasis on the customs of the people. The fact that virginity is considered -in general- as a necessary prerequisite for marriage by this society weighs heavily in acknowledging a quality directly and principally intended. It should be noted, however, that in presenting his argument for nullity, the *ponens*

144. «Etenim, iuxte innator mores, radicatae traditiones atque perennem culturam populi ceylonensis, uti deduci potest ex confessione partium in causa atque ex declarationibus omnium testium, '... la ragazza deve essere vergine al momento del matrimonio'. Immo, ipsa conventa candida confessa est: '*Secondo la nostra cultura, il buon carattere della ragazza è provato dalla sua verginità*', c. FALTIN, May 26, 1989, n. 15, in «*Ius Ecclesiae*» 2 (1990), pp. 177-190.

145. «In casu contractu, de quo hinc agitur, ex actis et probatis omni cum certitudine eruitur, qualitatem illam obiectivam, etiam subiective et expresse a viro, in contrahendo matrimonio, intentam fuisse», c. FALTIN, May 26, 1989, n. 15 «*Ius Ecclesiae*» 2 (1990), pp. 177-190.

146. Cfr. c. FALTIN, May 26, 1989, n. 15, in «*Ius Ecclesiae*» 2 (1990), pp. 177-190.

147. Cfr. c. FALTIN, May 26, 1989, n.1, in «*Ius Ecclesiae*» 2 (1990), pp. 177-190.

148. Cfr. c. FALTIN, May 26, 1989, n. 16 in «*Ius Ecclesiae*» 2 (1990), pp. 177-190.

puts more stress on the subjective estimation of the quality. All the evidence centers around the fact that the one contracting, in this matrimony, could not accept a non-virgin for a wife¹⁴⁹. The customs surrounding this matrimony are helpful in proving that a quality *might be* directly intended, but what must be proved is that it *was in fact* directly intended. The decision follows the route of proving a quality directly and expressly (through actions) intended. The distinction made earlier concerning a quality implicitly (because of the customs and traditions of a certain society), but directly, intended does not seem to be used. The majority of the evidence concerns *this* man and *his* behavior in *this* particular matrimony. Once again, the criteria of the subjective aspect receives greater attention.

II. ADDITIONAL QUESTIONS CONCERNING CANON 1097 § 2 («ERROR REDUNDANS» «ERROR CAUSAM DANS», AND RETROACTIVITY)

A. «Error causam dans» and an error of quality directly and principally intended

1. The difference in theory

Canon 1097 § 2 states that «Error concerning a quality of a person, even if such error is the cause of the contract, does not invalidate matri-

149. «Nihilominus, qualitas virginitatis in sponsa a viro non era suposita, sed simpliciter, iuxta suae gentis mores atque culturam, *necessario praerequisita*, ideoque *directe ac principaliter intenta*. Aliis verbis, id quod hinc interest, est actoris subiectiva rei aestimatio, de qua autem ambigendum non est, quod eruitur ex suo modo agendi statim ac detexerit, rudis et incultus cum sit, puellam virginem non fuisse.

»Tandem, ne repetamus ea quae supra iam retulimus, sufficiat hinc pauca facta atque circumstantias quasdam afferre, quae corroborant thesim actorem, veluti: a) iam prima nuptiarum nocte 'macanza di sangue *sconvolse definitivamente Giovanni*'; b) ille defectus sanguinis '... fu la ragione delle loro continue liti'; c) ob hanc rationem, ipse '... evitò qualsiasi tipo di conversazione con me e cominciò anche a bere'; d) post tres vel quattor dies ipse petiit '... di portarla via'; e) post separationem temporaneam unius hebdomadae, conventa, instantibus viri parentibus, rediit in domum mariti, sed '*il vecchio problema*' *permansit*, quod '*problema* lo spinse ad interrogarla continuamente'; f) exinde vita communis pro confuit '*...un inferno in terra*', adeo ut ipsa et suicidium attentavit et ita porro', c. FALTIN, May 26, 1989, n. 18 and n. 19, in «Ius Ecclesiae» 2 (1990), pp. 177-190.

mony unless this quality was directly and principally intended. «Like its predecessor of the 1917 code, this canon denies nullifying strength to an error which is merely the cause of contracting marriage. Since *error causam dans* does not ruin matrimonial consent, but an error of a quality directly intended does impede consent, it is not only useful -but essential- to clearly distinguish these two concepts¹⁵⁰.

In the 1917 code, *error causam dans* by itself had no nullifying effect upon the matrimonial bond, and this prohibition was respected by the jurisprudence when the figure of a quality principally and directly intended was introduced. In other words, Rotal jurisprudence, even before the new code, distinguished these two figures. This difference is clearly marked by a sentence c. Mannucci on June 20, 1932¹⁵¹. The *ponens* states that there was no error of an accidental quality which redounded in the person, but only an error which was the cause of the contract. The definition which the judge uses for a redounding error is that of a quality principally and directly intended. So, even as early as 1932, the jurisprudence distinguished these two figures¹⁵².

In 1969, Bejan also seems to differentiate when a quality is the cause of the contract and when a quality is principally intended. The *ponens* notes that the quality desired by the plaintiff, even if it were the cause of the contract, does not render the marriage invalid. He continues in the next paragraph speaking about qualities principally intended. (Although, it is true that the *ponens* considers this figure a type of condition *sine qua non*)¹⁵³.

150. Örsy mentions the difficulty which sometimes arises in distinguishing the two figures. Cfr. L. ÖRSY, *Marriage in Canon Law. Texts and Comments. Reflections and Questions*, Wilmington (Delaware) 1988, pp. 137-138.

151. Although this decision does not form part of those which are properly the object of this study, it is useful to see that a clear distinction was made very early on in Rotal jurisprudence.

152. «Nec pariter constat de errore qualitatis accidentalis redundantem in personam ... Adfuit ergo error, dans causam contractui: sed minime probatur error qualitatis redundans in errorem personae. Non probatur, quod haec qualitas asserta ingressa sit directe, principaliter, praecisive in consensum matrimonialem, eum definiendo seu positive limitando», c. MANNUCCI, June 20, 1932, n. 7.

153. «Deceptus quidem fuit vir in sua spe, sed error, etsi dederit causam contractui, cum destitutus sit qualitatibus a iure requisitis, invalidum non reddit matrimonium.

Judge Canals, in describing the less strict interpretation, cites Giacchi immediately after speaking about St. Alphonsus' third rule. The Italian professor makes the distinction thus:

«In the case of *error causam dans*, excluded by canon 1083 § 2 as a motive of nullity, the contractant principally intends to marry the other person even though this decision is made only because he assumes the existence of a quality, without which, the contractant would not have married. In the case of *error redundans*, (in the sense of St. Alphonsus' third rule) the contractant wishes to marry, in a certain sense, the desired quality -that is, an abstract type of person who is made up from the abstraction of that quality. (For example, 'the virgin', the 'noble', the 'musician', 'the diplomat', 'the American', etc.)»¹⁵⁴.

Here a clear distinction is made between a quality which causes one to contract matrimony and a quality which is desired as a fundamental and essential part of the matrimonial bond. The difference between the two concepts should be evident given Giacchi's explanation and the definition of an error of quality principally and directly intended.

In the case of *error causam dans*, as Giacchi points out, one is impelled to contract marriage because of a given quality of his/her partner. While it is true that the contractant would not have married had he/she known the desired quality to be absent, what the contractant did really desire or will, at that moment, was to marry.

Several authors make this distinction. Bañares, for one, clearly illustrates this point. The erroneous will pushed to marry because of an *error causam dans*, really «willed» matrimony. After discovering the error, the person manifests what he/she would have wanted in a given situation, but

»Etiam si admittere valimus actorem principaliter voluisse has qualitates in sponsa, tunc tantum error circa has qualitates irritat matrimonium, quando posita sunt sub forma conditionis sine qua non, de qua statim», c. BEJAN, July 16 1969, n. 12 *in fine*.

154. «Id sic explicat Giacchi: "Nel caso dell' *error causam dans*, escluso dal can. 1083 §2 come motivo di nullità, il nubente intende in via principale sposare l'altro contraente, anche se a questa decisione è venuto soltanto perché suppone nell'altro soggetto una qualità senza la quale non lo sposerebbe; mentre nel caso dell' *error redundans* il nubente vuole sposare, per così dire, la qualità considerata e cioè, a dir meglio, un astratto tipo di persona che è costituita dalla astrazione di quella qualità (ad esempio 'la vergine', il 'nobile', il 'musicista', 'il diplomatico', 'l'americano', ecc.)" (*Il consenso nel matrimonio canonico*, 1968, p. 73)», c. CANALS, April 20, 1970, n. 2.

not what he/she really *did* will. Here, one is dealing with a mere interpretative will, which as is known, does not affect what one desired *in actu*¹⁵⁵.

Typical expressions which indicate an error which is the cause of the contract include the following: «If I had known...», «He/She would not have married if it wasn't for (a certain quality)...», «The only reason the marriage took place was because he/she thought he/she was...». However, these types of statements manifest more clearly what the contracting spouse did will at the moment of the matrimony. The «I do» was an «I do» without hitches. The contractant married because of the quality, but the fact is that he/she really married. There was a true and simple matrimonial will.

Following Giacchi's distinction, one sees that an error of a quality principally and directly intended is even stronger or more demanding than *error causam dans*. The «I do» -the consent- is objectively bound to a desired quality which the contracting party believes the other to possess. In this case, the will actually includes this quality in the matrimonial consent. As Giacchi says, one wants to marry -in a certain sense- the quality embodied in the person¹⁵⁶. It is not a matter of what the person would have willed or done if he/she had known..., but rather, what the person did will at the moment of the matrimony. The fundamental difference is twofold: 1) the predetermination or previous binding of he will to a certain quality and 2) this predetermination invades the

155. «Resulta aquí de nuevo fundamental comprender en concreto la diferencia entre el conocer, y el querer actual. (Although the author is dealing with error concerning the properties of matrimony, the same observations are valid for the topic here treated.) En efecto si se tratase de un error antecedente o *causam dans*, ello no significaría que el consentimiento fuese nulo. Es cierto como ya vimos, que el error *causam dans* es aquél que es causa motiva del acto jurídico, en el sentido de que, de haberse conocido, no hubiera sido puesto por el sujeto. Pero esto mismo reafirma lo expuesto antes: pues tal error sólo indica 'lo que la voluntad habría querido en un supuesto determinado', pero no lo que realmente quiso; se trata de una simple 'voluntad interpretativa', que no prueba nada de la voluntad real *in actu*». J.I. BAÑARES, *El error y la ignorancia en el consentimiento matrimonial*, Pamplona, 1988, («pro manuscrito»).

156. The words «in a certain sense» are important. As is obvious one does not marry the quality, but the person. Only the person, with all of his/her qualities, is the object of matrimonial consent.

very matrimonial consent including the quality as part of the object of consent.

2. *The confusion in fact*

Although certainly distinguished in the 1917 code, and clear in theory, the difference between *error causam dans* and an error principally intended becomes, at times, blurry in the praxis. In some cases, it would seem that an error of quality principally and directly intended is present, but the evidence given only supports *error causam dans*. In others it is the opposite; one encounters an error which is the cause of the contract, but the decision considers there was an error of a quality directly intended.

Di Felice's decision of March 26, 1977, once again, serves as a useful example for the present issue. As was seen, this cause declares a marriage null because the plaintiff thought her husband was a doctor. The *ponens* seems to be clearly in favor of the third Alphonsian rule as an invalidating factor. He cites the previously mentioned texts of Mannucci and Heard where these sentences favorably present the Alphonsian interpretation.

Certainly, there is evidence to confirm that the quality of a doctor was directly intended, however it is mixed with evidence which demonstrates that the quality was the cause of contracting. This probably stems from the fact that the sentence speaks about an error which redounds in the person being at the same time an *error causam dans*. Taking as an example canon 1083 § 2, 2° which concerns slavery, the sentence reasons that there may be other errors with respect to similar qualities of the person, being the cause of the contract, which are able to invalidate the marriage (with the condition that the error redound in error of the person)¹⁵⁷.

157. «Quod explicitis verbis canon statuere debuerit, dum potius peculiaris determinatio erroris quoad qualitatem servitutis, implicite, demonstrat etiam alios errores quoad aequales personae, causam dantes contractui, invalidare matrimonium posse, dummodo redundant in errorem personae», c. DI FELICE, March 26, 1977, n. 4. It should be kept in mind that this affirmation is before the advent of the new code.

Given this consideration, the sentence classifies Mary's error in terms of the cause of the contract¹⁵⁸.

Throughout the *in facto* part of the sentence, there is a certain mixture of evidence which in some cases indicates an error of quality principally and directly intended, while in other cases, it indicates an error which is merely the cause of the marriage. Therefore, one encounters arguments similar to the following: «The plaintiff wished to marry a doctor more than Charles» (the respondent). This statement clearly demonstrates a quality principally and directly intended; the quality of a doctor was desired more than the person. Nevertheless, the evidence which follows denotes an error which was the cause of the contract and a mere interpretative will. «If she had known he was not a doctor, she would not have married him. So, error of the quality, intended by the will of the plaintiff in selecting a spouse for matrimony, redounds in the person»¹⁵⁹. Especially common are statements like: «I would not have married him had I known he was not a doctor.» «The fact the plaintiff thought the respondent was a doctor is what led to the marriage»¹⁶⁰. Without a careful reading of this decision and not having a clear distinction between *error causam dans* and an error of quality principally intended, this sentence could give the impression that an error which is the cause of the contract is sufficient to void a matrimony.

Other judges, following the line of an error of quality principally and directly intended, clearly distinguish this concept from an error which is the cause of the contract. The sentence by Agustoni on July 10, 1984 is

158. «Qui error causam matrimonio dedit, cum Adelanna [Mary] artem medici magni faceret et animo nubere prorsus medico quam Carolo Edmundo exoptaret, ...», c. DI FELICE, March 26, 1977, n. 8.

159. «Subiective autem error qualitatis in casu quam maxime obtinet, cum actrix potius medico quam Carolo Edmundo nubere voluerit. Immo, si scivisset eum medicum non esse, illa matrimonium haud contraxisset. Error qualitatis ergo, etiam voluntate actricis in seligendo sponso ad nuptias faciendas attenta, redundat in errorem personae,...», c. DI FELICE, March 26, 1977, n. 10 *in fine*

160. «Io certamente sapevo che era medico. Se fossi stata a conoscenza della realtà dei fatti, e cioè che Carlo non era medico, sono convinta che non l'avrei sposato». «Verum igitur asserit actrix in praesenti causa, cum affirmet se errore qualitas medicae artis consenti tantummodo inductum fuisse ad matrimonium cum eo contrahendum...», c. DI FELICI, March 16, 1977, n. 8 and n. 9 respectively.

especially interesting since it highlights this difference in both the *in iure* and *in facto* parts of the sentence¹⁶¹.

The *in facto* part of the cause states that the crux of the problem is not a matter of considering the error as a false judgement about something, or that it was the cause of the contract, but rather, one must determine in what manner the object of the error affected the consent¹⁶². At the same time, the sentence is a bit critical of the first instance decision because it concedes *error causam dans* but does not continue its reasoning to speak about other types of error which have a juridical impact. The *ponens* is in agreement that an error which is the cause of the contract has no juridical effect, but -the sentence continues- one must investigate the object of the error and how it may influence the validity of the bond. He continues speaking precisely about the difference between *error causam dans* and an error which affects the substance of matrimonial consent¹⁶³.

The most interesting and critical part of the sentence, though, is when the *ponens* proves the quality (lack of hereditary mental illness) was directly intended and not merely the cause of the marriage. Agustoni argues that the words «If I had not obtained the guaranties, I would not have continued» cannot be understood as an interpretive will. It is not the same to say, «If I had not known» and «If I had not obtained the guaranties,». This second expression clearly denotes a positive act of the will. The plaintiff obtained proofs -guaranties- concerning his wife's mental health. He took positive steps to assure the desired quality existed in his spouse. (For example, the letter to her father, as referred to previously). Agustoni

161. This cause has an interesting Rotal history: c. Ferraro, December 9, 1975, *pro vinculo*; c. Raad, June 22, 1978, *pro vinculo*; the present sentence, *pro nullitate* for error; c. DI FELICE, June 22, 1985, confirms the previous sentence. None of the other decisions have been published in the SRD.

162. «Non enim primo et principaliter error considerandus erat utpote falsae rei apprehensio vel causa contractus, sed attendendum erat obiectum erroris, scilicet qualitas quae consensum, ex quo coniugium fit, afficit», c. AGUSTONI, July 10, 1984, n. 15 *in fine*.

163. «Cum vero lex statuatur nullum esse declarandum matrimonium quoque ex errore initum, dummodo error cadat super qualitatem in personam redundantem, in foro externo iam non est instandum, num error causam dederit contractui, sed potius quatenus fuerit qualitas, seu obiectum erroris relate ad substantiam foederis nuptialis», c. AGUSTONI, July 10, 1984, n. 16 *in fine*.

indicates that these words (of course, combined with the actions they imply) are totally different from saying, «If I had known», a phrase which does not prove the matrimonial will having been bound to the quality¹⁶⁴.

Thus, Agustoni bases his evidence on a careful and discerning interpretation of the plaintiff's testimony, and he explicitly addresses the difference between an error of quality directly intended and an error which is the cause of the contract.

A decision by Judge Colagiovanni in 1983 declared a matrimony null for error but was later overturned because it seemed to confuse (or fuse) the two types of error being discussed. The *in iure* part of the sentence contains arguments which appear to support an error of quality principally intended, at the same time though, there are other arguments which (while trying to illustrate the Alphonsian concept) support or describe *error causam dans* instead. The *ponens* first speaks about an error which is not only the motive for the contract, but constitutes an essential part of the matrimonial alliance. This is an error of quality principally and directly intended¹⁶⁵.

In the following number, though, he cites a text from Pompedda which describes *error causam dans*, not an error of a quality principally intended. Colagiovanni's argument, based on an earlier decision by Pompedda, is that an error which causes the matrimony to be celebrated is

164. «Primo enim ait: 'Si je n'avais pas obtenu de garanties, je n'aurais pas donné de suite'; Nosque obiter adnotamus quod loquutio testis nequit intellegi pro voluntate interpretativa. Idem non est dicere 'si j'avais su' ac 'si je n'avais pas obtenu des garanties'; quia hic alter modus dicendi denotat actum voluntatis positivum. Et prosequitur: 'Ces renseignements m'ont donné confiance'. 'Je pensais être totalement rassuré'. 'Autant que je puisse juger à l'heure actuelle, si j'avais appris au moment du mariage ou peu avant qu'il y avait dans la parentée d'Elaine des anomalies psychiques, à plus forte raison des tares mentales héréditaires, j'aurais rompu'», c. AGUSTONI, July 10, 1984, n. 17. This last sentence seems to fall more squarely in the area of *error causam dans*.

165. «Qui error... "scolpendo il soggetto ed inerendo strettamente ad esso, non solo motiva, ma altresì concorre essenzialmente al processo formativo dell'atto umano (in genere, in quanto tale e, in specie, in quanto matrimoniale) e ne costituisce l'oggetto o, quanto meno, una componente essenziale" [A.C.. JEMOLO, *Il matrimonio*, Torino, 1961, p. 124; COLANTONIO, *Error qualitatis redundans in errorem personae*, *Monitor Ecclesiasticus*, II (1983) pp. 202-203]». C. COLAGIOVANNI, November 22, 1983, n. 15.

sufficient to invalidate the same if this quality, because of its importance, makes the other person very special. This is Canals' theory combined with *error causam dans* ¹⁶⁶.

Later, Colagiovanni cites an author who considers the motive which drives the will as the central point of the volitional act. The *ponens*, therefore, seems to consider the motives for contracting as important in the matrimonial will. As a result, the conclusion is that *error causam dans* vitiates the matrimony when the quality about which there is error is objectively important¹⁶⁷.

The *in facto* part of the cause, as is logical, offers evidence which denotes *error causam dans*, not an error of a quality principally intended. The girl fell in love with Titus because of his qualities, not because she specifically looked for a person with these characteristics¹⁶⁸.

In the appeal of this sentence, Judge Stankiewicz rejects the grounds of error. His fundamental reason is that there was no error concerning Titus' qualities, but rather a change in his character¹⁶⁹. Nevertheless, what is of interest here is that Stankiewicz makes a clear and direct distinction between the two figures¹⁷⁰. Citing the words of Fumagalli, Stankiewicz claims that an error which is the cause of the contract cannot void the matrimony since this type of error is merely an abnormal element in the intellect. The intellect, it is true, supplies the will with erroneous in-

166. «Hinc est quod tertia regula alphonsoniana, cui facile remittit nova renovati Codicis norma (can. 1097, § 2), praevalens facta est penes N.S.F. iurisprudentiam iuxta quam si probetur eatenus quis contraxerit, 'quatenus in comparte qualitatem aliquam erronee putat exstare adeo ut certo non contraheret si non adesset' (causam Pompedda, diei 25 novembris 1978), dummodo talis qualitas vel summa qualitatem 'personam faciat peculiarissimam' et qua talis per matrimonium appetatur, si deficiat, aliam personam faciat cui consensus praestitus non fuit», c. COLAGIOVANNI, November 22, 1983, n. 16.

167. «Scribit G.: "Il punto centrale dell'atto volitivo è dato dall'influenza dei motivi che sollecitano la volontà ad autodeterminarsi per la realizzazione di un fine...; motivo dell'atto volitivo è tutto ciò che si presenta all'individuo come un valore da raggiungersi che si presenta come un bene nei rispetti dell'individuo" (*Introduzione alla psicologia*, «Vita e Pensiero», II ed., pp. 286-287)», c. COLAGIOVANNI, November 22, 1983, n. 18.

168. Cfr. c. COLAGIOVANNI, November 22, 1983, n. 20.

169. This aspect was already discussed.

170. «Sed error, qui dicitur 'redundans', vel in qualitate personae directe et principaliter intenta, (note fusion of terms) confundi nequit cum simplici errore qualitatis vel dante causam contractui», c. STANKIEWICZ, December 19, 1985, n. 15.

formation, but this error does not enter into the object of the volitional act¹⁷¹.

The *ponens* continues arguing that whether the error be antecedent or concomitant, the consent (in these cases) is still brought to bear directly on the person and indirectly on the quality, even though this quality be the motive of the contract. Taking examples from St. Alphonsus, this type of error is manifested in phrases such as the following: «I wish to marry Ticia, whom I think is a noblewoman». or, one already seen, «If I had known the error, I would not have contracted marriage»¹⁷².

3. Reason for the confusion

Although some authors do not see a difference between *error causam dans* and a quality principally and directly intended, the code explicitly distinguishes the two, and some Rotal Judges have done the same. Stankiewicz and Agustoni have distinguished the figures in theory and in fact; others have the difference clear in theory, but sometimes indiscriminately mingle the concepts in practice.

The occasion of such a «mixing» gave rise to an interesting distinction by Bañares. In commenting a decree by Masala dated March 25, 1986, this author points out that the phrase «he would not have married had he known...» as written in the decree is not sufficient to prove an error of quality directly intended. This formula fits too closely an interpretative will which is not what canon 1097 deals with, since it expressly excludes *error causam dans*¹⁷³.

171. «Nam huiusmodi error, etsi det causam contractui, matrimonium irritum non reddit (can. 1097, § 2), quia "è solo un errore vizio, e cioè un elemento anormale nella formazione psicologica del presupposto intellettuale del consenso che tuttavia non entra nell'oggetto della volontà" (FUMAGALLI CARULLI, O., *Intelletto e volontà*, cit., p. 257)», c. STANKIEWICZ, December 19, 1985, n. 15.

172. «Iamvero in tali errore, sive ille sit antecedens sive concomitans, consensus fertur directe in personam compartis, indirecte autem et secundario in qualitatem, quae ita vertitur in motivum contrahendi, si quis dixerit, exempli gratia 'volo ducere Titiam, quam puto esse nobilem', etiamsi 'si cognito errore, matrimonium non fuisset contractum' (S. ALPHONSUS DE LIGORIO, *Theol. moralis*, cit., nn. 1016, 1012, pp. 31. 28)», c. STANKIEWICZ, December 19, 1985, n. 15.

173. Cfr. J.I. BAÑARES, *Tratamiento del «error qualitatis» en el código actual*, in «*Ius Canonicum*» 28 (1988), p. 651.

Bañares acknowledges that some authors do not differentiate between an error which is the cause of the contract and that which is principally intended. However, in his opinion, following the thought of Giacchi and Fumagalli, there is a real difference: the motive for which a person wants something is not the same as the object of wanting. As he points out, a person may marry because of money or piety towards a sick person, but one wants to marry. One thing is the motor of the volitional act, and another thing is what this motor pushes one to will¹⁷⁴.

This distinction (in accordance with current legislation) is well made. One may perceive a difference between the motive for acting -what pushes one to act- and what is desired in this act of the will. Sometimes the cause for acting may also be the specific object of the volitional act, but this cause does not *necessarily* have to be included in the object of consent. This is the fundamental difference: a quality which is the cause of the contract is the motor for giving consent, but it does not become part of the object of consent as in a quality directly and principally intended.

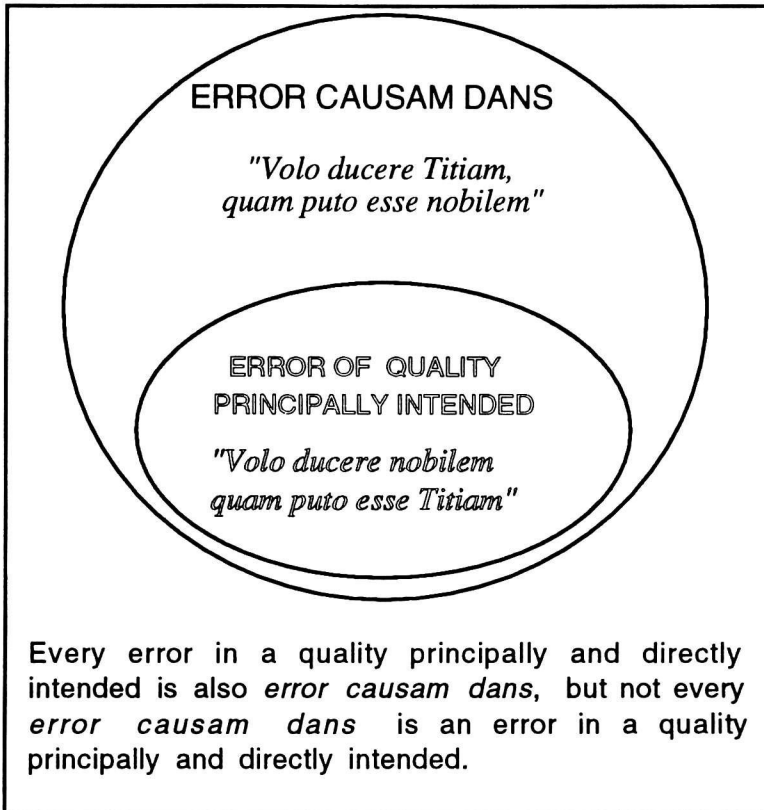
Why is it then, that the two errors seem to be often mingled?¹⁷⁵ Part of the reason may be the relation between an error of a quality principally

174. «Mostaza, A., ha expuesto su opinion contraria a la instauración de este capítulo de nulidad, precisamente por entender que no puede diferenciarse del *error causam dans* (Cfr. o.c. y otros artículos anteriores citados en ella).

»En nuestra opinión, su critica a Giacchi y Fumagalli no afecta al fondo de sus argumentos. Con Fumagalli, pensamos que no es lo mismo el motivo por el que alguien quiere algo, y el objeto del querer en sí. Se puede querer el matrimonio por dinero, o por piedad con un enfermo, etc., y sin embargo querer contraer. Una cosa es el motor inicial del acto de querer, y otra aquello a lo que ese motor lleva a querer. (Cfr. FUMAGALLI, O., *Intelletto e volontà nel consenso matrimoniale in diritto canonico*, Milano 1974, pp. 257-262). Cfr. BERNÁRDEZ CANTÓN, A., *Compendio de derecho matrimonial canónico*, 5ª ed., Madrid 1986, p. 148». J. I. BAÑARES, *Tratamiento del «error qualitatis» en el código actual*, in «*Ius Canonicum*», 28 (1988), p. 651, footnote 4.

175. As another example, a passage from a sentence is cited which grants the nullity for error, but the reasoning includes proofs of *error causam dans*. «*Actis attente coram Domino rimatis atque ponderatis, censent infrascripti patres dominam Irmam matrimonium cum Roberto contraxisse quia in viro essentielles erronee inveniebat qualitates quibuscum suae aspirationes seu intentiones concrete affirmabantur. Cum autem hae determinatae qualitates in viro directe et principaliter intendebantur (cf. can. 1097 novi Codicis), verificatur exinde error circa qualitates personae in errorem personae redundans*», c. HUOT, November 24, 1987, n. 46, in «*Il Diritto Ecclesiastico*» (1988)4, pp. 462-474.

intended and *error causam dans*; the former is a further restriction of the latter. (*Vid.* Figure).



Another way of expressing this relation is in terms of the characteristics of each error. All of the properties which correspond to *error causam dans* also correspond to an error of a quality directly intended. However, not all of the properties of an error as regards a quality directly intended correspond to *error causam dans*. The former is a much stricter concept.

This means that whatever is predicated about an error which is the cause of the contract can also be predicated about an error of a quality directly intended. Therefore, statements such as «If I had known, I would

not have...» or «He/She would not have contracted had he/she ...» can be said about both types of error. The decisions are correct in their logic and reasoning when they make these affirmations about the error contemplated in canon 1097 § 2, but they have to prove more. They have to prove that the motive, the cause for contracting, actually became an essential part of the consent. Every error of quality principally and directly intended is *error causam dans*, but it is also more. For this reason, not every *error causam dans* is an error of quality directly and principally intended. The «I do» of this latter figure includes the quality as part of its object of volition, while the «I do» of the former has its motor of volition in the quality, but the object is matrimony pure and simple.

Another reason for the confusion stems from the fact that people normally speak in terms of *error causam dans*. Judges, therefore, will normally have to discern an error of quality directly intended from the actions of the plaintiff or a careful reading of the acts as Agustoni does in his case of 1984. (However, even he uses some testimonies which prove only *error causam dans*). In most causes, it will be a combination of both actions and declarations. What the Church asks of her judges is moral certainty (*Cfr.* canon 1608)¹⁷⁶.

One final observation may be offered. It should be obvious that there have been and will be many marriages because of a certain event(s) or quality(ies). This is common and normal. However very few people enter marriage with the idea of contracting with a person who must enjoy a certain quality to the point of assuming this quality into the consent. Although it is not impossible, it is, in general, unlikely. Therefore, it would seem this chapter of nullity will be employed infrequently by jurisprudence in granting annulments¹⁷⁷.

176. Concerning moral certainty and evaluation of proofs in matrimonial causes *Cfr.* C. de DIEGO-LORA, *Estudios de derecho Procesal Canonico* (2. *Temas sobre causas matrimoniales*), Pamplona 1973, pp. 13-19.

177. With this understanding of the two types of error, which the code explicitly distinguishes, one avoids that this canon would become a matrimonial loophole as has happened with canon 1095.

B. *The retroactivity of canon 1097 § 2*

Considering the definition of an error of quality as contemplated in canon 1097 § 2 and proposed by this study, the question of retroactivity is undisputable. Since this type of error vitiates the consent in its very germination, there is no doubt that the supposed matrimony never existed. Therefore, the question is not strictly one of retroactivity, but that its nullifying force is based on natural law.

This is the solution which Judge Huot accepts concerning an error of the person. After quoting canon 1097, he cites Reiffenstuel who maintains that this error impedes consent by natural law¹⁷⁸. The judge continues his reasoning speaking about how a quality principally and directly intended can invade and make up part of the object of matrimonial consent. If the object is lacking, then so is consent¹⁷⁹. Later in the sentence, the *ponens* returns to the same idea. He claims that, without a doubt, an error of quality which redounds in the person is void by natural law because it affects the substance of the contract. This time, the Roman auditor supports his statement with a quotation from Wernz-Vidal¹⁸⁰. Finally, the sentence re-asserts the idea that a quality principally intended affects the very substance of consent so that, if the quality is lacking so is the object of the contract. Therefore, by natural law, the matrimony is void¹⁸¹.

178. Cfr. c. HUOT, November 24, 1987, n. 15, in «Il Diritto Ecclesiastico» (1988)4, pp. 462-474.

179. Using Reiffenstuel's words, the *ponens* states: «Tunc matrimonium invalidum quoque foret ex defectu consensus, utpote qui non ferebatur in personam, nisi praeditam qualitate illa speciali intenta...», c. HUOT, November 24, 1987, n. 15, in «Il Diritto Ecclesiastico» (1988)4, pp. 462-474.

180. «Sine ullo dubio exinde error personae vel qualitatis in errorem personae redundantis *ipso jure naturae* consensus inficit, nullum proinde reddit matrimonium. Ad rem scribit Wernz-Vidal: 'Error de *qualitate* personae *redundans in personam*, cum revera sit error substantialis de ipsa persona, pariter jure naturae ob defectum consensus dirimit matrimonium'. (WERNZ-VIDAL, *Jus canonicum*, Tom. V, *Jus matrimoniale*, Romae, 1928, nn. 467 et 468)», c. HUOT, November 24, 1987, n. 34, in «Il Diritto Ecclesiastico» (1988)4, pp. 462-474.

181. «Qualitates ipsam contractus *substantiam* ingrediuntur atque constituunt ac proinde, deficientibus illis, deficit objectum contractus; deficiente autem objecto, deficit et ipse consensus. *Ipsa jure naturae* matrimonium exinde nullum verificatur». c. , November 24, 1987, n. 46, in «Il Diritto Ecclesiastico» (1988)4, pp. 462-474.

Other Roman judges are not so bold as to base their reasoning in favor of retroactivity on natural law. They do, though, esteem the figure of a quality principally and directly intended as a valid solution considering it the natural evolution (and resolution) of canon 1083 § 2, 1°.

For instance, Judge Agustoni's decision of 1984, after having described the new canon's wording as «vague», still considers it as the best interpretation of the 1917 canon. Therefore, this evolutionary interpretation is rightly considered, in his opinion, as one which «fits» under canon 1083¹⁸².

Di Felice's decision of 1985 seems to be of the same opinion. After quoting the text of canon 1083, the auditor claims that more recent Rotal jurisprudence has accepted the Alphonsian interpretation for *error redundans*¹⁸³. Di Felice afterwards cites four Rotal sentences which use Ligouri's third rule as a legally effective solution to causes accused on the grounds of canon 1083 § 2 of the old code¹⁸⁴.

Judge Funghini would also seem to accept the retroactive force of the 1983 legislation. Although he does not explicitly cite canon 1097, Funghini favorably mentions Canals' less strict and wide interpretations of *error redundans*. He seems to consider these interpretations as the natural evolution of canon 1083, and therefore, applicable to matrimonies celebrated before the new code came into effect. In addition, based on an observation at the beginning of his discussion, he would seem willing to place the nullifying force in natural law since a quality principally and

182. «Verum tamen nova lex clarius exprimit tum mentem Legislatoris, cum finem legis, ita ut interpretationes quae olim audacem evolutionem sapere dicebantur iam auctoritate confirmantur et solido fruuntur fundamento. His innixi Nos quoque tutius in disceptando hoc altero capite progressi sumus; licet causa iuxta praeteritam legem sit diiudicanda...

»Sub luce igitur can. 1097, § 2, novi Codicis - quem optimum interpretem etiam veteris legis considerare oportet eo vel magis quod integram retinuit veteris Codicis primam partem paragraphi secundae can. 1083 - error matrimonium irritat si vertit circa qualitatem quae prae matrimonio intenditur», c. AGUSTONI, July 10, 1984, n. 12 and n. 14 respectively.

183. «Recentior autem iurisprudentia Nostri Fori ampliorem usum erroris qualitatis in errorem personae redundantis suscepit, si qualitas prae persona revera intenditur, 'quia directe et principaliter intenditur qualitas et minus principaliter persona' (S. ALPHONSUS DE LIGORIO, *Teologia moralis*, 1832, Lib. IV, Tract. VI, cap. II, n. 1016)», c. DI FELICE, November 16, 1985, n. 10.

184. Here Di Felice lists the following decisions: c. MANNUCCI, June 20, 1932; c. HEARD, June 21, 1941; c. HEARD, January 14, 1956, and c. BEJAN, July 16, 1969.

directly intended is -in a certain sense- the object of consent. If this quality is lacking, then so is consent¹⁸⁵. Concerning this aspect, his reasoning is much like that of Judge Huot.

In 1987, Judge Palestro handed down a decision which specifically cites only the old legislation. At the same time, though, he accepts the consensual interpretation of the third Alphonsian rule as a valid reading of canon 1083¹⁸⁶. This would seem to be an implicit acknowledgement of the retroactive force of canon 1097.

Judge Parisella moves along the same lines. In his decision of June 16, 1983 (which is after the promulgation of the new code but before it came into vigor), the judge only mentions canon 1083. However, he too would seem to be in agreement with the Alphonsian interpretation as used in the new legislation¹⁸⁷.

In his decision of March 20, 1985, Judge Lanversin, in the *in facto* part of the sentence, claims that the cause should be defined according to the old code because one is dealing with a substantial matter and not a procedural topic. However, the *ponens* continues claiming that Alphonsus' third rule (considered as a condition) is a correct interpretation. Moreover the *in iure* part of the cause specifically cites canon 1097 § 2 and says nothing about canon 1083¹⁸⁸. It seems the new code is being used.

Faltin, Jarawan, Colagiovanni and Stankiewicz simply use the new code without giving any explanations or considerations about retroactivity. Thus, they seem to accept the retroactive force of canon 1097 § 2¹⁸⁹.

185. «In prima hypothesis error circa substantiam contractus habetur cum ipsum obiectum eiusque naturam attingat, in altera qualitas, quae primo et principaliter intenditur, veluti vices gerit totius obiecti: qualitas illa scilicet est quodammodo pro toto obiecto ita ut hoc reicitur, illa deficiente», c. FUNGHINI, February 24, 1988, n. 6, in «Monitor Ecclesiasticus» 113 (1988), pp. 450-467.

186. Cfr. c. PALESTRO, June 24, 1987, in «Il Diritto Ecclesiastico» (1988)2, pp. 3-13.

187. Cfr. c. PARISELLA, June 16, 1983 especially n. 57.

188. Cfr. c. LANVERSIN, March 20, 1985, n. 3 and n. 11.

189. Cfr. c. FALTIN, May 26, 1989; c. JARAWAN, December 18, 1984; c. COLAGIOVANNI, November 22, 1983; c. STANKIEWICZ, December 19, 1985; c. STANKIEWICZ, January 24, 1984; and c. STANKIEWICZ, February 24, 1983. It is interesting to note that two of these sentences were given even before the new code came into effect.

Pompedda's decision of July 22, 1985 maintains, in principle, that the cause should be judged by the old code¹⁹⁰. However, the entire *in iure* part of the cause deals with the possible interpretations of canon 1097 (concerning which Judge Pompedda feels that there should be some further refinements). From the *in facto* part of the cause, it would seem he is in favor of using the interpretation as given by canon 1097 considering it the natural evolution of canon 1083.

The only auditor who openly denies the retroactive force of 1097 § 2 is Judge Masala. In a decree dated March 25, 1986, he claims that since the matrimony took place before November 27, 1983 (the date which the new code came into effect), the cause should be judged according to the 1917 code¹⁹¹. Despite this statement, Masala does consider the cause under the new canon as well as the old. As Bañares points out in his article, perhaps Masala feared that his denial of retroactivity would be disputed. The Roman judge concedes that «even if one were to consider 1097 § 2 retroactive...». He then goes on to deny the nullity under this chapter as well¹⁹².

In general, it would seem that the majority of Roman judges accept the retroactive force of canon 1097 § 2, be it explicitly or implicitly. Some simply use the new code without any explanations. Huot bases the nullifying force of 1097 § 2 on natural law given that a quality principally intended becomes a part of matrimonial consent. If the quality does not exist, then neither does consent. Other auditors would seem to implicitly accept the retroactive force of canon 1097 § 2 given that -in their opinion- it is the natural evolution and best interpretation of the old canon 1083¹⁹³.

190. «Patet insuper ex iisdem dictis praesentem causam iudicandam et definiendam esse iuxta can. 1083, § 2, 1° codicis abrogati idest anni 1917», c. POMPEDDA, July 22, 1985, n. 16.

191. «Cum matrimonium in causa celebratum sit ante diem 27 novembris a. 1983, quo nova legislatio vim habere cepit, casus decernendus est iuxta can. 1083 veteris legis, ad quam provocavit et ipse actor in suo libello». Decree c. MASALA, March 25, 1986, n. 4 in «Ius Canonicum» 28 (1988), pp. 637-639.

192. «Quod si admitteretur can. 1097, § 2 Codicis juris canonici, recenter editi, habere valorem retroactivum (quod infrascripti Auditores non admittunt), ...». Decree c. MASALA, March 25, 1986, n. 4, in «Ius Canonicum» 28 (1988), pp. 637-639.

193. C. Gullo seems follows this reasoning as well. Cfr. C. GULLO, *Note minime su retroattività e rapporto fra par I e II del can. 1097 C.J.C.*, in «Il Diritto Ecclesiastico» (1986)2, pp. 356-366. However, the present work would not agree with the idea, as the

Only one judge openly denied retroactivity, but it is significant that he did continue to expressly judge the cause under the new canon as well as the old one. Following is a table which summarizes the different stances of the decisions studied given after 1982.

		Uses can. 1097	Accepts Evolvy. intrp.	Rejects Retro.
STANKIEWICZ	Feb. 24, 1983	√		
PARISELLA	Jun. 16, 1983		√	
COLAGIOVANNI	Nov. 22, 1983	√		
STANKIEWICZ	Jan. 24, 1984	√		
AGUSTONI	Jul. 10, 1984		√	
JARAWAN	Dec. 18, 1984	√		
DE LANVERSIN	Mar. 20, 1985		(√)	
POMPEDDA	Jul. 22, 1985		(√)	
DI FELICE	Nov. 16, 1985		√	
STANKIEWICZ	Dec. 19, 1985	√		
MASALA	Mar. 25, 1986			√
PALESTRO	Jun. 24, 1987		√	
HUOT	Nov. 24, 1987	√		
FUNGHINI	Feb. 24, 1988		√	
FALTIN	May 26, 1989	√		

(√) indicates that in principle the old code is used but the judge seems to accept St. Alphonsus' interpretation.

author maintains on p. 357, that new formulation of canon 1097 § 2 is only a formal difference and not a substantial change.

With the author's acceptance of the evolutionary interpretation, he would seem to have modified his stance as presented in his article of 1981. *Cfr.* C. GULLO, *Error qualitatis redundans in errorem personae*, in «Il Diritto Ecclesiastico» (1981)1, p. 359.

CONCLUSIONS

1. Judge Canals' famous decision of 1970 marked a new era in the interpretation of *error redundans*. Not only did his interpretation (insightful but also widely disputed) of this juridical figure have a profound effect on subsequent jurisprudence, but it also paved the way in helping to understand the exact components and to have a clearer concept of this chapter of nullity.

2. Eventually, the appreciation of *error redundans* was considered by some Rotal judges to consist in a double aspect or a combination of two currents: Canals and St. Alphonsus. The quality should be objectively important, and the same quality must be principally and directly intended by the contractant.

3. However, a study of Rotal sentences would seem to indicate that the objective interpretation, although correct in theory, resisted a coherent interpretation in concrete causes.

4. At the same time, Rotal judges, following the teachings of Vatican II, began placing more emphasis on the content of this matrimonial consent; the mere *ius in corpus* began giving way to the *consortium totius vitae*. Therefore, the subjective estimation of the quality, especially when looked at from the point of view of consent, was seen to have a greater effect on the matrimonial bond.

5. A clear shift in focus began to develop: away from the quality and towards the consent or will of the contracting party. As a result, the objective aspect of the quality becomes relatively important while the subjective aspect has an absolute importance.

6. The logic of this juridical figure revolves around the fact that the quality desired invades the very substance of the contract. In other words, the quality becomes part of the object of consent; if the object of the matrimonial consent is lacking then the consent itself is deficient, and therefore, no matrimonial bond is generated. This opinion is perfectly harmonious with the consensual system of matrimony as recently emphasized by the Council.

7. Proving a quality was principally and directly intended usually rests more heavily on the actions of the plaintiff than on his/her testimony.

8. Concerning the actions of the plaintiff, there are two fundamental moments which must be taken into account: 1) the predetermination of the contractant's will before the matrimony concerning the quality¹⁹⁴, and 2) the reaction and behavior of the contractant upon discovering the error.

9. The objective importance of the quality -according to the customs or traditions of the society- serves as a very useful indicator that a particular quality may be directly and principally intended; thus, it can be one element in proving the marital consent essentially includes this quality. However, that this quality was, in fact, directly intended by a specific person must be proved in each particular case.

10. *Error causam dans* and an error of quality directly and principally intended can be distinguished in theory and in fact; they are clearly differentiated in the code.

11. *Error causam dans* is the motive for acting; it is what pushes one to emit the volitional act. An error of quality principally and directly intended is not only the cause of willing, but moreover, it becomes part of the object of consent.

12. Error of a quality principally and directly intended seems to be a subset of an error which is the cause of the contract. Everything that can be predicated about *error causam dans* is also true of an error of quality as contemplated in canon 1097 § 2. However, to appreciate an error of quality principally intended, one must go further and prove a much greater identity between the cause and the consent: this latter must contain the former.

194. The will's antecedent and predeterminate binding to the quality is described thus by one author: «La objetividad debe darse por tanto no en mostrar un error en cualidad grave, sino en mostrar que realmente existió en el sujeto la determinación previa y absoluta de su voluntad, vinculándose al hecho en cuestión. Es, por tanto, esta vinculación la que debe ser *objetiva* para el juez, y la que debe demostrarse en un proceso de nulidad». J.I. BAÑARES, *El error y la ignorancia en el consentimiento matrimonial*, Pamplona 1988, («pro manuscripto»).



13. For the reason given above, and because people tend to speak more about the things which induced them to marry, sometimes these two concepts are not always clearly distinguished.

14. The retroactivity of 1097 § 2 is accepted by the majority of sentences which have discussed this issue be it by explicitly using canon 1097 or be it implicitly by recognizing the substance of the canon (St. Alphonsus' third rule) as a valid interpretaion of canon 1083 of the 1917 code.

15. Considering the inherent linkage between quality and consent, it appears that the retroactive force should be based on natural law. In other words, when the quality which is directly and principally intended is lacking there is no matrimonial consent; it simply does not exist. The reason stems from the fact that this quality becomes an essential part of the object of the volitional act. Therefore, if this object is lacking, the volitional act (the consent) is void in its root.



JURISPRUDENCE

SENTENCES

c. Mori	Nov. 30, 1910	SRRD	Vol. 2	pp. 334 ff.
c. Mannucci	Jun. 20, 1932	SRRD	Vol. 24	pp. 230 ff.
c. Heard	Jun. 21, 1941	SRRD	Vol. 33	pp. 528 ff.
c. Heard	Aug. 7, 1948	SRRD	Vol. 40	pp. 342 ff.
c. Heard	Nov. 12, 1955	SRRD	Vol. 47	pp. 757 ff.
c. Heard	Jan. 14, 1956	SRRD	Vol. 48	pp. 48 ff.
c. Bejan	Jul. 16, 1969	SRRD	Vol. 61	pp. 813 ff.
c. Canals	Apr. 21, 1970	SRRD	Vol. 62	pp. 370 ff.
c. Ferraro	Jul. 18, 1972	SRRD	Vol. 64	pp. 464 ff.
c. Ewers	Feb. 10, 1973	SRRD	Vol. 65	pp. 86 ff.
c. Pinto	Nov. 12, 1973	SRRD	Vol. 65	pp. 725 ff.
c. Agustoni	Oct. 10, 1976	SRRD	Vol. 68	pp. 358 ff.
c. Di Felice	Mar. 26, 1977	SRRD	Vol. 69	pp. 147 ff.
c. Di Felice	Jan. 14, 1978	SRRD	Vol. 70	pp. 13 ff.
c. Pompedda	Nov. 25, 1978	SRRD	Vol. 70	pp. 516 ff.
c. Stankiewicz	Feb. 15, 1980	SRRD	Vol. 72	pp. 91 ff.
c. Pompedda	Jul. 23, 1980	SRRD	Vol. 72	pp. 522 ff.
c. Pompedda	Jul. 28, 1980	SRRD	Vol. 72	pp. 549 ff.
c. Serrano	May 28, 1982	SRRD	Vol. 74	pp. 308 ff.
c. Stankiewicz	Feb. 24, 1983	SRRD	Vol. 75	pp. 42 ff.
c. Parisella	Jun. 16, 1983	SRRD	Vol. 75	pp. 341 ff.
c. Colagiovanni	Nov. 22, 1983	SRRD	Vol. 75	pp. 653 ff.
c. Stankiewicz	Jan. 24, 1984	SRRD	Vol. 76	pp. 44 ff.
c. Agustoni	Jul. 10, 1984	SRRD	Vol. 76	pp. 442 ff.
c. Jarawan	Dec. 18, 1984	SRRD	Vol. 76	pp. 642 ff.
c. Lanversin	Mar. 20, 1985	SRRD	Vol. 77	pp. 166 ff.
c. Pompedda	Jul. 22, 1985	SRRD	Vol. 77	pp. 395 ff.
c. Di Felice	Nov. 16, 1985	SRRD	Vol. 77	pp. 495 ff.
c. Stankiewicz	Dec. 19, 1985	SRRD	Vol. 77	pp. 629 ff.
c. Palestro	Jun. 24, 1987	in «Il Diritto Ecclesiastico» (1988)2, pp. 3-13.		
c. Huot	Nov. 24, 1987	in «Il Diritto Ecclesiastico» (1988)4, pp. 462-474.		
c. Funghini	Feb. 24, 1988	in «Monitor Ecclesiasticus» 114 (1989), pp. 450-467.		
c. Faltin	May 26, 1989	in «Ius Ecclesiae» 2 (1990), pp. 177-190.		



DECREES

- c. Giannecchini Mar. 25, 1983 in F. DELLA ROCCA, *Diritto Matrimoniale Canonico: tavole sinottiche. Secondo volume di aggiornamento*, pp. 117-118.
- c. Masala Mar. 25, 1986 in «*Ius Canonicum*» 28 (1988), pp. 637-639.
- c. Doran Nov. 9, 1989 in «*Monitor Ecclesiasticus*» 116 (1991), pp. 379-389.



BIBLIOGRAPHY

SOURCES

Communicationes, Pontificia Commissio Codici Iuris Canonici Recognoscendo, 1969-1983, Rome; *Sacrae Romanae Rotae Decisiones*, 1909 ff.

AUTHORS

BAÑARES, J.I., *Tratamiento del «error qualitatis» en el código actual*, in «Ius Canonicum» 28 (1988), pp. 647-662; ID., *El error y la ignorancia en el consentimiento matrimonial*, Pamplona 1988 (*pro manuscripto*); DELGADO, G., *Error y matrimonio canónico*, Pamplona 1975; DIEGO-LORA, C. DE, *Estudios de derecho Procesal Canónico*. (2. *Temas sobre causas matrimoniales*), Pamplona 1973; DI FELICE, A., *La recente giurisprudenza rotale circa l'«error qualitatis redundans in errorem personae»*, in «*Studia in honorem A. card. Sabattini*», Città del Vaticano 1984, pp. 39-50; FEDELE, P., *Analisi di recenti sentenze ecclesiastiche in tema di nullità di matrimonio*, in «*Ephemerides Iuris Canonici*» 9 (1953), pp. 347-415; ID., *Il tema di «error qualitatis redundans in errorem personae»*, in «*Ephemerides Iuris Canonici*» 10 (1954), pp. 304-312; D., *Error qualitatis redundans in errorem personae*, in «*Il Diritto Ecclesiastico*» (1934), pp. 175-202; ID., *Ancora in tema di «error qualitatis redundans in errorem personae»*, in «*Ephemerides Iuris Canonici*» 6 (1950), pp. 149-155; FUMAGALLI, O., *Persona e società nel matrimonio canonico con particolare riferimento all'error facti*, in «*Il Diritto Ecclesiastico*» (1981)2, pp. 148-185; GULLO, C., *Error qualitatis redundans in errorem personae*, in «*Il Diritto Ecclesiastico*» (1981)1, pp. 323-359; ID., *Note minime su retroattività e rapporto fra par I e II del can. 1097 C.J.C.*, in «*Il Diritto Ecclesiastico*» (1986)2, pp. 356-366; LÓPEZ ALARCÓN, M., *El «error qualitatis personae» en el consentimiento matrimonial según el nuevo Código de Derecho Canónico*, Murcia 1983; ID., *El error de cualidad en el consentimiento matrimonial*, in «*XVIII Semana española de Derecho Canónico*», Salamanca 1984, pp. 293-303; MANS PUIGARNAU, J.M., *El error de cualidad en el matrimonio ante la reforma del Código de Derecho Canónico*, Barcelona 1964; MOLANO, E., *Contribución al estudio sobre la esencia del matrimonio*, Pamplona 1977; MOSTAZA, A., *El error doloso como causa de nulidad del matrimonio canónico*, in «*Trabajos de la XV Semana de Derecho Canónico*», Salamanca 1976, pp. 113-191; ÖRSY, L., *Marriage in Canon Law. Texts and Comments. Reflections and Questions*, Wilmington (Delaware) 1988; DE REINA, V., *Error y dolo en el matrimonio canónico*, Pamplona 1967; RINCÓN-PÉREZ, T., *La «qualitas» y el «error in personam»*, in «*Ius Canonicum*» 12 (1972), pp. 347-364; VILADRICH, P.J., *Comentarios al Código de Derecho Canónico*, Pamplona 1987, pp. 659-660.



TABLE OF CONTENTS OF THE THESIS

INTRODUCTION. CHAPTER I: INTRODUCTORY NOTIONS AND A BRIEF HISTORICAL PERSPECTIVE CONCERNING ERROR. A. Concepts and definitions. 1. Matrimonial Consent. 2. Error and Ignorance. 3. Divisions of Error. B. A Brief Doctrinal History of Error of quality of the person. 1. Gratian. 2. St. Thomas Aquinas. 3. Thomas Sánchez on *error redundans*. 4. The «Third Rule» of St. Alphonsus Liguori. 5. Cardinal Gasparri. 6. Principal doctrinal opinions concerning St. Alphonsus' Third Rule. 7. The drafting of canon 1097. CHAPTER II: *ERROR REDUNDANS* AND A NEW INTERPRETATION OF THE PERSON. A. Introduction. B. The Strict Interpretation of *error redundans*. 1. Characteristics. 2. Appreciating *error redundans* in the facts of the causes. 3. The role of an accidental quality and condition in the strict interpretation of *error redundans*. 4. Sentences which criticize the strict interpretation C. A New Definition of the Person for *error redundans*. 1. A new definition begins to develop. 2. *Coram* Canals, April 21, 1970. 3. Subsequent Jurisprudence directly influenced by Canals' interpretation. a) The wide sense of the person advocated by Vatican II. b) The notion of an important quality c) Qualities necessary for the marriage. D. Conclusions. CHAPTER III: THE THIRD RULE OF ST. ALPHONSUS (A SHIFT OF EMPHASIS FROM THE QUALITY TO CONSENT). A. Sentences which use a combination of Canals' interpretation and St. Alphonsus' third rule to recognize *error redundans*. B. Changes in the concept of matrimony which have influenced the notion of *error redundans*. C. A Brief History of St. Alphonsus' Third Rule in older Rotal Jurisprudence. 1. The Decision *coram* Heard, June 21, 1941. 2. The Decision *coram* Heard, August 7, 1948. 3. The Decision *coram* Heard, November 12, 1955. 4. The Decision *coram* Heard, January 14, 1956. D. A quality principally and directly intended. 1. Relative importance of the objective aspect and absolute importance of the subjective aspect. 2. A shift of focus from the quality to the consent. 3. Is a positive act of the will necessary for marital consent to be vitiated? 4. Observations concerning the act of the will in a quality directly and principally intended. E. Proving a quality principally and directly intended. 1. Sentences which did not grant the nullity. 2. Sentences which did grant the nullity. F. Conclusions. CHAPTER IV: ADDITIONAL QUESTIONS CONCERNING CANON 1097 § 2 (*error redundans*, *error causam dans*, and retroactivity). A. *Error redundans* and an error of quality directly and principally intended. B. *Error causam dans* and an error of quality directly and principally intended. 1. The difference in theory. 2. The confusion in fact. 3. Reason for the confusion. C. The retroactivity of canon 1097 § 2. D. Conclusions. CHAPTER V: ERROR OF QUALITY, CONDITION AND FRAUD. A. Jurisprudence which equates the figures of error concerning a quality principally intended and condition. B. Characteristics of condition. 1. The postponing effect of a condition. 2. A positive act of the will. 3. The necessity of doubt. a) Decisions which do not require doubt. b) Decisions which do require doubt. C.



Jurisprudence which distinguishes the figures of error and condition.. D. A Proposal for Distinguishing the two Figures. 1. The problem of doubt. 2. An ontological difference? E. Deceit as a Grounds for Nullity. F. The Retroactivity of 1098. 1. Sentences which reject the retroactivity of Canon 1098. 2. Sentences which support the retroactivity of Canon 1098. G. Conclusions. SUMMARY. APPENDIX. JURISPRUDENCE. BIBLIOGRAPHY.